SUPREME COURT OF THE UNITED STATES.

No. 421.

THE MAYOR AND ALDERMEN OF THE CITY OF GALENA, PLAINTIFFS IN ERROR.

VS.

THE UNITED STATES, EX REL. HENRY AMY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

INDEX.

	Original.	Print.
Præcipe	5	1
Bond for costs	6	2
Information	7	2
Alternative writ of mandamus and answer to do.	15	5
Demurrer to answer	41	14
Record entry, (demurrer sustained)	45	16
Record entry.	45	16
Motion for leave to amend	46	16
Stipulation for leave to amend	47	17
Record entry, (order for peremptory writ)	49	17
Appeal bond	52	18
Clerk's certificate	55	19
Citation and service	56	19
Writ of error	57	20

4 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-room in the city of Chicago in the district aforesaid, before the Hon. Thomas Drummond, district judge of said district, and in the absence pro tempore of the Hon. David Davis, one of the justices of the Supreme Court of the United States, sole judge of said circuit court, on Thursday, the fifteenth day of November, in the year of our Lord one thousand eight hundred and sixty-six, and of our independence the ninety-first year.

WM. H. BRADLEY, *Clerk.*

THE UNITED STATES OF AMERICA, at the relation of E. W. Clark and brothers,
vs.
THE CITY OF GALENA, ITS MAYOR, Aldermen, and other officers.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered, that on the twenty-first day of February,
5 in the year of our Lord one thousand eight hundred and sixty-six, the United States of America, at the relation of Henry Amy, relator filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, his præcipe and information for an alternative writ of mandamus against the city of Galena, its mayor, aldermen, and other officers, defendants. And also at the same time said relator filed his bond for costs in said entitled cause, which said præcipe, bond, and information are respectively in the words and figures following, to wit:

Præcipe.

Circuit court of the United States for the northern district of Illinois.

THE UNITED STATES, on the relation of Henry Amy,
vs.
THE MAYOR AND ALDERMEN OF THE CITY of Galena.
} Information for a mandamus.

The relator now comes into court and files his information, and prays of this court to cause to be issued a writ of mandamus to the mayor and aldermen of the city of Galena, Illinois, commanding them to levy the taxes prayed for in said information, returnable, &c.
6 GRANT, *for the Relator.*

Indorsed: Filed Feb'y 21, 1866.

WM. H. BRADLEY, *Cl'k.*

Bond.

Circuit court of the United States for the northern district of Illinois.

THE UNITED STATES, on the relation of Henry Amy, *vs.* THE MAYOR AND ALDERMEN OF THE CITY of Galena. } Information for a mandamus.

I do hereby enter myself security for costs in the above-entitled cause, and acknowledge myself bound to pay all costs which may accrue them to the defendants or any of the officers of this court.

C. WHITAKER.

Dated this 10th day of February, A. D. 1866.

Indorsed: Filed Feb'y 21, 1866.

WM. H. BRADLEY, *Cl'k.*

7 *Information.*

In the circuit court of the United States for the northern district of Illinois, at Chicago.

THE UNITED STATES, in the relation of Henry Amy, *vs.* THE MAYOR AND ALDERMEN OF THE CITY of Galena. } Information for a mandamus.

Henry Amy, who avers that he is a citizen of the State of New York, comes and gives this court to be informed that he commenced a suit at law in the circuit court of the United States for the northern district of Illinois against the city of Galena, a municipal corporation created by, and a citizen of, the State of Illinois, and by due process of law, on the 16th of January, A. D. 1866, recovered judgment against the city of Galena for the sum of $19,377 50 debt, $768 82 damages, and $68 17 costs, making a total of $20,214 49. That said judgment was recovered for the principal of thirty-two bonds executed by the city of Galena for $500 each, making the sum of $16,000. The balance, except the $68 17 costs, was for interest on said bonds.

2. This relator further gives this court to be informed, that one Luther C. Clark, who he avers is a citizen of the State of New York, commenced a suit in the same court against the said city of Galena on these bonds executed by said city, and by due process of
8 law, on the 16th of January, A. D. 1866, recovered a judgment in said court for the sum of $1,564 01 debt, $109 96 damages, and 46 12 cents costs, making a total of $1,720 09, of which sum $1,500 00 was for principal, $173 97 was for interest, and $46 12 was for costs. That said Luther C. Clark has assigned said judgment to the relator for value received, and he is now the owner thereof. A copy of said assignment is hereto annexed.

3. That said bonds, in each case, were issued by the city of Galena, whose affairs are managed and controlled by its mayor and aldermen for the purpose of making various public improvements in the city of Galena. Said judgments were recovered in this court, and the record thereof is before the court, subject to its inspection. That it was the duty of the mayor and aldermen, when said bonds were issued by the mayor and aldermen of said city, to provide for the payment of the yearly interest, for which purpose proper ordinances were passed; but the same have for many years not been enforced by the mayor and aldermen.

That it was the duty of the mayor and aldermen to provide
9 for the payment of both principal and interest of said bonds, and to pay said judgments; but they have neglected so to do. That a demand has been made of the mayor and aldermen that they levy and collect the proper and necessary taxes to pay said judgments, interest, and costs; and they refuse so to do. That the corporation has no property subject to execution, out of which said judgment can be made.

The relator further gives the court to be informed that the mayor and aldermen of said city of Galena were authorized by an act of the legislature of this State of *of* Illinois of June 21, 1852, to levy on the taxable property of said city, in addition to a tax of half per cent. by previous act of the legislature of a tax not exceeding one per cent. on the dollar of the assessed real and personal estate made taxable in said city, to defray the ordinary contingent and other expenses of said city not therein provided for, which taxes were to constitute the general fund for city purposes.

By the same act the mayor and aldermen of said city were
10 authorized by a vote of a majority of all the aldermen elected, when the city council believed the public good required it, to levy a tax not exceeding one per cent., in addition to other taxes, to be kept separate and *and* apportioned. pro rata. every year, to pay such public debt as might be presented by the holder. and said act was to continue in force until the city indebtedness and interests was paid, and no longer.

That by an act of the legislature of said State of January 30th, 1857, the said mayor and aldermen, the city council of said city of Galena were authorized to levy a tax on the assessed value of the property of the said city, taxable by the laws of the State. of one per cent., to constitute the general fund of said city. By the same act the said city council was authorized to levy a tax of not exceeding one per cent. on the dollar on all the taxable property in said city subject to taxation, to meet the accruing interest on the debt of said city, and no debt was to be created without making provision for the payment of the interest on said debt.

That by the same act the city council was authorized to levy
11 and collect taxes on the property in said city subject to taxation, when required to erect a city hall, markets, hospitals, house of correction, docks, or dams, purchase of market grounds, public squares, or parks, or any other public improvements; and by

these various acts and the power conferred in them, it became the duty of mayor and aldermen of said city to levy taxes for the payment of the principal and interest of said bonds, and the judgments therein referred to and costs.

5. The relator further gives this court to be informed that mayor and aldermen of said city, who compose the city council, have long since neglected to levy any of the specific taxes authorized to be levied to pay either interest or principal of their said public debt; and they have used, and intend to continue to use, their general fund for other purposes than the payment of their public debt. The relator further shows that he is informed that the taxable property within the limits of said city does not, for the year 1865, exceed one million of dollars; that a tax of one per cent. to pay the interest, and one per cent. to pay the principal, will not be sufficient in one year to pay said judgments, interest, and costs.

4. The relator prays for a peremptory writ of mandamus to be issued from this court, directed to the mayor and aldermen of the city of Galena, and their successors in office, commanding them, for the year A. D. 1866, to levy a tax on the taxable property of said city of one per cent. to pay the principal, and one per cent. to pay the interest and costs on said judgments, and to continue to levy a like amount for each succeeding year, until said judgments, interest, and costs are wholly paid.

HENRY AMY.

STATE OF IOWA, *Scott County:*

I, James Grant, being duly sworn, declare on oath that I am the attorney of the relator: that I was the attorney who prosecuted the suits and recovered said judgments, and made the demand for the levy of taxes to pay the same; and I know the facts stated in said information to be true.

JAS. GRANT.

Subscribed and sworn to by James Grant, before me and in my presence, this 13th day of Feb., A. D. 1866.

Witness my hand and seal notarial the day and year last above written.

[SEAL.]

J. F. SMITH,
Notary Public, Scott Co., Iowa.

Copy of assignment of Clark's judgment.

Know all men by these presents, that Luther C. Clark, of the State of New York, for value received, have assigned and transferred to Henry Amy, of the same State, all my right, title, and interest in and to a judgment recovered in the circuit court of the United States for the northern district of Illinois, which was rendered in said court in my favor, on the 16th of Jan'y, 1866, at Chicago, against the corporation of the city of Galena, in said State, for the sum of

$1,564 01 debt, and $109 96 damages and costs, authorizing said Amy to use all lawful process to collect said judgment.

Given under my hand and seal this 20 July, 1866.

[SEAL.] LUTHER C. CLARK.

Witness:

EDMUND DODGE.

[Revenue stamp.]

Indorsed: Filed Feb'y 21, 1866.

WM. H. BRADLEY, *Cl'k.*

14 On this day, to wit, the 21st day of February, A. D. 1866, in the December term, A. D. 1865, of said court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

Information for mandamus.

THE UNITED STATES, on the relation of HENRY Amy,
vs.
THE MAYOR AND ALDERMEN OF THE CITY OF Galena.

Now comes the relator by James Grant, esq., his attorney, who filed the information of said relator praying for a writ of mandamus herein, and on his motion it is ordered by the court that an alternative writ of mandamus issue against the defendants, returnable to the next term of this court, to be holden on the first Monday of March next.

15 On this day, to wit, the 24th day of February, A. D. 1866, an alternative writ of mandamus issued out of said clerk's office against said defendants in said entitled cause, which said writ, together with the answer of the said defendants thereto attached, is in the words and figures following, to wit:

Alternative writ of mandamus.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the mayor and aldermen of the city of Galena:

Whereas the United States, on the relation of Henry Amy, who avers that he is a citizen of the State of New York, lately in our circuit court of the United States for the northern district of Illinois, to wit, on the 21st day of February, in the year of our Lord one thousand eight hundred and sixty-six, filed an information for a writ mandamus against the mayor and aldermen of the city of Galena, a municipal corporation created by, and a citizen of, the State of

16 Illinois. Which said information is in the words and figures following, to wit:

Information for a mandamus.

In the circuit court of the United States for the northern district of Illinois, at Chicago.

THE UNITED STATES, on the relation of HENRY Amy,
v.
THE MAYOR AND ALDERMEN OF THE CITY OF Galena.

Henry Amy, who avers that he is a citizen of the State of New York, comes and gives this court to be informed that he commenced a suit at law in the circuit court of the United States for the northern district of Illinois, against the city of Galena, a municipal corporation created by, and a citizen of, the State of Illinois, and by due process of law, on the 16th of January, A. D. 1866, recovered judgment against the city of Galena for the sum of $19,377 50 debt, $768 82 damages, and $68 17 costs, making a total $20,214 49. That
17 said judgment was recovered for the principal of thirty-two bonds executed by the city of Galena for $500 00 each, making the sum of $16,000 00. The balance, except the $68 17 costs, was for interest on said bonds.

This relator further gives this court to be informed that one Luther C. Clark, who he avers is a citizen of the State of New York, commenced a suit in the same court against the said city of Galena, on these bonds executed by said city, and by due process of law, on the 16 day of January, A. D. 1866, recovered a judgment in said court for the sum of $1,564 01 debt, $109 96 damages, and 46 12 cents costs, making a total of $1,720 09, of which sum $1,500 was for principal, $173 97 was for interest, and $46 12 was for costs. That said Luther C. Clark has assigned said judgment to the relator for value received, and he is now the owner thereof; a copy of said assignment is hereto annexed.

That said bonds in each case were issued by the city of Ga-
18 lena, where affairs are managed and controlled by its mayor and aldermen, for the purpose of making various public improvements in the city of Galena, said judgments were recovered in this court and the record thereof is before the court subject to its inspection. That it was the duty of the mayor and aldermen, when said bonds were issued by the mayor and aldermen of said city, to provide for the payment of the yearly interest, for which purpose proper ordinances were passed; but the same have for many years not been enforced by the mayor and aldermen. That it was the duty of the mayor and aldermen to provide for the payment of both principal and interest of said bonds and to pay said judgments, but they have neglected so to do. That a demand has been made of the said mayor and aldermen that they levy and collect the proper and necessary taxes to pay said judgments, interest, and costs; and they refuse so to do. That the corporation has no property subject to execution out of which said judgment can be made.

19 The relator further gives the *the* court to be informed that the mayor and aldermen of said city of Galena were authorized by an act of the legislature of this State of *of* Illinois, of June 21, 1852, to levy on the taxable property of said city, in addition to a tax of half per cent. by previous act of the legislature, of a tax not exceeding one per cent. on the dollar of the assessed real and personal estate made taxable in said city to defray the ordinary contingent and other expenses of said city not therein provided for, which taxes were to constitute the general fund for city purposes.

By the same act the mayor and aldermen of said city were authorized, by a vote of a majority of all the aldermen elected when the city council believed the public good required it, to levy a tax not exceeding one per cent. in addition to other taxes, to be kept separate and apportioned pro rata every year to pay such public debt as might be presented by the holder, and said act was to continue in force until the city indebtedness and interest was paid, and no longer.

20 That by an act of the legislature of said State, of January 30th, 1857, the said mayor and aldermen, the city council of said city of Galena, were authorized to levy a tax on the assessed value of the property of the said city taxable by the laws of the State of one per cent., to constitute the general fund of said city. By the same act the said city council was authorized to levy a tax of not exceeding one per cent. on the dollar on all the taxable property in said city subject to taxation to meet the accruing interest on the debt of said city, and no debt was to be created without making provision for the payment of the interest on said debt.

That by the same act the city council was authorized to levy and collect taxes on the property in said city subject to taxation, when required, to erect a city hall, markets, hospitals, house of correction, docks, or dams, purchase of market grounds, public squares, or parks, or any other public improvements. And by these various acts the power conferred on them, it became the duty of mayor and

21 aldermen of said city to levy taxes for the payment of the principal and interest of said bonds and the judgments therein referred to and costs.

The relator further gives the court to be informed that mayor and aldermen of said city, who compose the city council, have long since neglected to levy any of the specific taxes authorized to be levied to pay either interest or principal of their said public debt, and they have used and intend to continue to use their general fund for other purposes than the payment of their public debt.

The relator further shows that he is informed that the taxable property within the limits of said city does not, for the year 1865, exceed one million of dollars; that a tax of one per cent. to pay the interest and one per cent. to pay the principal will not be sufficient in one year to pay said judgments, interest, and costs.

The relator prays for a peremptory writ of mandamus to be issued from this court, directed to the mayor and aldermen of the city of Galena and their successors in office, commanding them, for the

22 year A. D. 1866, to levy a tax on the taxable property of said

city of one per cent. to pay the principal and one per cent. to pay the interest and costs on said judgments, and so continue to levy a like amount for each succeeding year until said judgments, interest, and costs are wholly paid.

HENRY AMY.

STATE OF IOWA, *Scott County:*

I, James Grant, being duly sworn, declare on oath that I am the attorney of the relator; that I was the attorney who prosecuted the suits and recovered said judgments, and make the demand for the levy of taxes to pay the same, and I know the facts stated in said information to be true.

JAS. GRANT.

Subscribed and sworn to by James Grant, before me and in my presence, this 13th day of Feb., A. D. 1866.

Witness my hand and seal notarial, the day and year last above written.

[SEAL.] J. F. SMITH,
Notary Public, Scott Co., Iowa.

23 *Copy of assignment of Clark's judgment.*

Know all men by these presents, that Luther C. Clark, of the State of New York, for value received, have assigned and transferred to Henry Amy, of the same State, all my right, title, and interest in and to a certain judgment recovered in the circuit court of the United States for the northern district of Illinois, which was rendered in said court in my favor on the 16 of Jan'y, 1866, at Chicago, against the corporation of the city of Galena, in said State, for the sum of $1,564 01 debt, $109 96 damages and costs, authorizing the said Amy to use all lawful process to collect said judgment.

Given under my hand and seal this 20th Jan'y, 1866.

[L. S.] LUTHER C. CLARK.

Witness:
EDMUND DODGE.

[Revenue stamp.]

Indorsed: Filed Feb'y, 21, 1866.

WM. H. BRADLEY, *Cl'k.*

24 On this day, to wit, the 21st day of February, A. D. 1866, in the December term, A. D. 1865, of said circuit court, in the record of the proceedings thereof, appears the following entry, to wit:

Information for mandamus.

THE UNITED STATES, on the relation of Henry Amy,
vs.
THE MAYOR AND ALDERMEN OF THE CITY OF Galena.

Now comes the relator, by James Grant, esq., his attorney, who files the information of said relator, praying for a writ of mandamus herein; and on his motion it is ordered by the court, that an alternative writ of mandamus issue against the defendants, returnable to the next term of this court, to be holden on the first Monday of March next.

We therefore command you, the mayor and aldermen of the city of Galena, and your successors in office, that you do forthwith, under the authority of *of* the acts of the legislature of the State of
25 Illinois referred to in the foregoing information, proceed to levy and collect a tax for the year A. D. 1866, on the taxable property of said city of Galena, of one per cent. to pay the principal, and one per cent. to pay the interest and costs on said recited judgments, and to continue to levy a like amount for each succeeding year, and when collected that you do pay the amount of the tax so collected each year to said relator, on the two certain judgments recovered on the 16th of day January, A. D. 1866, in the circuit court of the United States for the northern district of Illinois, against the city of Galena, one of which judgments, is in favor of Henry Amy, for the sum of $20,146 32 debt and damages, besides costs of suit; and the other is in favor of Luther C. Clark for the sum of $1,673 97 debt and damages, besides costs of suit, together with interest on the same until said judgments, interest, and costs are wholly paid, or that you show cause to the contrary to our said circuit court of the United States for the northern district of Illinois, at the next
26 term thereof, to be held at the United States court-room in the city of Chicago, in the district aforesaid, on the first Monday of March next.

And of this writ, and in what manner you have obeyed the command therein made, you are required to make due return on said day and at said place, and hereof fail not at your peril.

To the marshal of the northern district of Illinois to execute.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States at Chicago, in said district, this twenty-fourth day of February, A. D. 1866, and of our independence the 90th year.

WM. H. BRADLEY, *Clerk.*

27 The answer of the mayor and aldermen of the city of Galena within mentioned:

We, the undersigned, the mayor and aldermen of the city of Galena, do hereby certify to the court for answer to the alternative writ of mandamus hereto attached, that the said city of Galena had not

at the time of the making of the demand for the payment of the judgment in the said writ alleged to have been recovered against it, nor has it at any time since had, nor has it now, any money or funds with or out of which it could or can pay the said judgment or either of them, or any part thereof, to the said relator.

And we do further certify to said court, that by section one of chapter five of an act of the general assembly of the State of Illinois, entitled "An act to reduce the law incorporating the city of Galena and the several acts amendatory thereof into one act, and for other purposes," approved January 30th, 1857, it is provided as follows:

28 SEC. 1. The city council shall have power within the city by ordinance to levy and collect annually taxes not exceeding one per cent. on the dollar on the assessed value of all real and personal estate and property within the city, and all personal property of the inhabitants thereof, made taxable by the law of the State for State purposes, to defray the general and contingent expenses of the city, not herein otherwise provided for: which taxes shall constitute the general fund.

And we do further certify, that the only other provisions of said act under the head of "taxation," and defining and fixing the power of the said city council in respect thereto, are contained in the second, third, fourth, and fifth sections of said chapter five, which are as follows:

SEC. 2. To annually levy and collect a school tax, not exceeding five mills on the dollar on all property taxable for State purposes, for purchasing grounds for school houses, building and repairing school houses, and supporting and maintaining schools.

29 SEC. 3. To levy and collect taxes, not exceeding one per cent. on the dollar per annum, on all property subject to taxation to meet the interest accruing on the debt of the city, and the city council shall pass no ordinance or resolution incurring any debt, without at the same time making provision for the levying of a tax sufficient to meet the interest accruing thereon when payable.

SEC. 4. To levy and collect taxes on all property subject to taxation when required for the erection of a city hall, market, hospitals, houses of correction, ways, docks, locks, or dams, the purchase of market grounds, public squares, or parks, or any other public improvement.

SEC. 5. To levy and collect upon all property in such district as they shall from time to time create a tax sufficient to defray one half of the expense of erecting lamp posts and lamps, and lighting the streets in such district, and the tax thus collected shall be exclusively expended for such purposes in the district paying the same.

30 And we do further certify to the court that the said city of Galena derived all its corporate power from, and exercised the same under, the act of the general assembly of the State of Illinois aforesaid, and from and under no other authority, from and after the passage of the said act up to and until the amendment thereof as

hereinafter stated; that by the said act the mayor and aldermen of said city were constituted the city council of said city, and as such were vested with the power of taxation granted to said city, and that said power of taxation was, by the sections of chapter five of said act above recited, limited and restricted in the manner and to the objects and purposes in the said sections specified.

And we do further certify that the city council of said city, under and in pursuance of the power of taxation so conferred upon it by the act aforesaid, and under the first section of chapter five of said act, did annually, and on or about the first day of October in
31 each and every year, from the passage of said act, up to and until the amendment thereof, and from thence up to the present time, (said section one not having been modified or repealed by the amendment aforesaid of said act,) by ordinances duly passed for that purpose, levy a tax of one per cent. on the dollar on the assessed value of all real and personal estate and property within said city, and all personal property of the inhabitants thereof made taxable by the laws of the State for State purposes, to defray the general and contingent expenses of the city; and did also, until the amendment of said act as aforesaid, annually and in the manner and at the times aforesaid, under and in pursuance of the third section of said chapter five, levy a tax of one per cent. on the dollar on all property subject to taxation to meet the interest accruing on the debt of said city. That the taxes so levied under the first section of said chapter five of said act, have been in each year collected
32 by the proper officers of said city and applied and fully expended by and under the direction of said city council in defraying the general and contingent expenses of said city; and that the taxes so levied under and in pursuance of the third section of said chapter five, have been in like manner collected, and also, under the direction of said city council, fully expended in the payment of interest accruing from year to year on the debt of said city.

And we do further certify to the court, that by the second clause of section four of chapter four, entitled "city council, its general powers and duties," of the act aforesaid, it is provided that the city council of said city shall have full and exclusive power and authority within the jurisdiction of the city by ordinance. "Second. To levy and collect taxes upon all persons and property made taxable by law for State purposes, whenever the interest of the city may require." And that by section fifteen of an act of the general assembly of the State of Illinois, approved February 6th, 1865, and entitled "An act to amend an act entitled 'An act to reduce the law incor-
33 porating the city of Galena, and the same acts amendatory thereof into one act, and to amend the same, and for other purposes.'" approved January 30th, 1857, it is provided as follows:

"SEC. 15. The second clause of the fourth section of that portion of the act to which this is an amendment, entitled 'City council, its general powers and duties,' is hereby repealed, and in lieu thereof, it is hereby enacted as follows:

"Second. To levy and collect taxes upon all persons and property

made taxable by law for State purposes, whenever the interests of city may require: *Provided however*, That the aggregate tax shall not exceed two and one-half per cent. per annum."

And we do further certify to the court, that by section twelve of the act last aforesaid, it is further provided as follows:

"SEC. 12. The city council shall levy and collect a tax of one per cent. on the dollar per annum on all property subject to taxation, which tax, when collected, shall be set apart for the sole and exclusive purpose of paying the interest upon the public debt of the city
34 whilst the same is in existence." And by section eighteen of said last mentioned act, section three of chapter five of said act of January 30th, 1857, hereinbefore recited was repealed.

And we do further certify that by section nineteen of said amendatory act of February 6, 1865, it was provided as follows:

"SEC. 19. All acts or parts thereof which conflict with the provisions of this act, are also repealed, but nothing in this act shall be so construed as to deprive the city council of said city of any power or authority conferred upon the same by the act incorporating the city, and the various acts amendatory thereof, except so far as such powers and authority have been expressly modified or repealed by this act or the acts heretofore mentioned."

And we do further certify that the city council of said city derives all its present power and authority to tax the property, real and personal, within the limits and jurisdiction of said city, from the act of January 30th, 1857, and the amendment thereto contained in the
35 said act of February 6th, 1865. That the provisions of said acts relating to said power of taxation are as above set forth, and that said power is thereby limited in its extent to the levying of an aggregate tax of two and one-half per cent. on the assessed value of said property.

And we do further certify to the court that under and in pursuance of the 12th section of the act of February 6th, 1865, aforesaid, the said city council of said city did, in the month of October, 1865, levy a tax of one per cent. on the dollar on all property within the jurisdiction of said city subject to taxation. That said tax has been since collected and wholly absorbed and expended in the payment of interest due upon the public debt of said city.

And we do further certify that principal of the debt of said city of Galena now is, and for many years last past has been, about the sum of one hundred and forty-two thousand two hundred and
36 seventy two dollars, and that the assessed value of the property, real and personal, within the limits and jurisdiction of said city is about the sum of seven hundred and forty thousand dollars, and that the interest upon the said debt annually accruing due, now exceed, and for several years past, has exceeded one per cent. upon the assessed value of the property in said city liable to taxation; and that the ordinary and necessary expenses of supporting and carrying on the government of said city, have at all times been equal to and for some years have exceeded the amount of one per cent. upon the assessed value of said property. That the greater part of the

debt of said city was incurred long prior to the passage of the acts above mentioned, and was originally in the form of scrip or orders upon the treasurer of said city, issued in payment for public improvements, at a small percentage of their par value, but which were subsequently funded and converted into bonds of said city, upon
37 which said city has already paid a large amount of interest.

That at the time of the funding of said indebtedness, and for some years subsequently thereto, the offices of said city were in a prosperous condition; but that since the year 1855, the assessed value of the property within the limits of the said city liable to taxation has diminished more than one-half. whilst its actual value has decreased in a still greater ratio, whilst the necessary expenses of administering the government of said city, and the performance of the duties devolved upon it by the laws and ordinances of said city, have remained substantially unchanged.

And we do further certify that during all the time since the passage of the act of January 30th, 1857, aforesaid, and during each and every year, the city council of said city has levied, and, so far as was practicable, has collected, all the taxes which by the acts aforesaid it was authorized to levy and collect, and that the same have been applied and exhausted by a proper appropriation thereof
38 to the respective purposes for which, under said acts, they they were levied and collected as aforesaid, and had been so applied and exhausted previously to the issuing of said writ.

And we do further certify to the court that we, the mayor and aldermen of said city of Galena, and constituting the city council of said city for the present year, intend in good faith towards said city and all its creditors, the relator included, to levy and collect for the current year, by taxation of the real and personal property within the limit of said city, the full amount of taxes which, by the acts aforesaid, we are authorized to levy and collect, and for the purposes in said acts specified. But that the general assembly of the State of Illinois having, by the acts aforesaid, placed a limit upon the power of taxation in and for said city, we are wholly unable to raise any money or funds for the payment of the judgments men-
39 tioned in said writ, excepting by means of proper ordinances passed under and in pursuance of the first section of chapter five of the act of January 30th, 1857, aforesaid, and by the provisions of said section such moneys so raised are first to be applied to the payment of the ordinary and contingent expenses of said city, and unless so applied the government of said city cannot be carried on or administered.

Wherefore we say that a peremptory writ of mandamus ought not to be awarded, except as to the residue of the moneys so raised and to be raised by said taxes as aforesaid under said first section of said chapter five, after the payment therefrom of the general and contingent expenses of said city, and the necessary costs and expenses of administering government thereof; all of which we, the mayor and aldermen of said city, to whom the writ aforesaid, is directed do certify to the court.

40 In testimony whereof we have hereunto set our hands, this 3d day of April, A. D. 1866.

LOUIS SHISSLER, *Mayor.*
HENRY MARFIELD,
Alderman, 2d Ward.
JOSEPH HASER,
Alderman, 4th do.
PHILIP BOLLINGER,
Alderman, 1 Ward.
JOSEPH H. BARRY,
Alderman, 5 Ward.
SAMUEL SNIDER,
Alderman, 3 Ward.

McALLISTER, JEWETT & JACKSON, *Att'ys for Def't.*

Indorsed: Filed May 22d, 1866.

WM. H. BRADLEY, *Cl'k.*

41 On this day, to wit, the 6th day of June, A. D. 1866, came said relator, by his attorney, and filed in said clerk's office his demurrer in said entitled cause, which said demurrer is in the words and figures following, to wit:

Demurrer.

U. S. C. C. for N. dist. Ill.

THE U. S., ex re. HENRY AMY,
vs.
THE MAYOR AND ALDERMEN OF the City of Galena. } Mandamus.

Now comes the plaintiff by Grant, his attorney, and says, that the said return to said writ, and the matters therein set forth are not sufficient in law to bar the said writ, and the plaintiff is not bound in law to reply to the same. And this, &c., wherefore for want of a sufficient return he prays judgment, &c.; and for cause of demurrer to said return, the plaintiff shows—

1st. By the act of the general assembly of June 21, 1852, S. 4, the city council were required to levy a specific tax, not exceeding one per cent., to be kept separate, and applied in payment of the funded debt of the city of Galena. This act was not repealed by the act of 1857, or the act of 1865, and the return shows no
42 reason why the city council should not levy this tax as prayed for. The act of 1852 required the tax to be continuously levied until the whole city debt was, and is, irrepealable as to the plaintiff's debt.

2d. The said return does not aver or show that any of the previous taxes levied by the city council to pay interest on the public debt were applied on the interest of the plaintiff's bonds. His judgment for interest shows that it was not paid. The application for the writ

is for future levies to apply to his judgment's debt, and the return shows no reason why the future levies should be so applied.

3d. It is no bar to the relief sought that the defendants, in 1865, levied a tax of one per cent., and applied it in the payment of interest on the city debt. There is no averment that any part of it was applied in payment of the plaintiff's interest; the plaintiff as a judgment creditor acquires a lien on the public debt tax, which cannot be taken from to pay non-judgment creditors.

43 4th. If the interest on the public debt exceeds the revenue collected to pay it, the plaintiff, by his judgment, is entitled to be paid first, and the return shows no reason why he should not.

5th. The legislature had no power by the act of 6 Feb., 1865, to repeal the interest tax of act of 1857, or principal tax of 1852. These acts gave rights to the creditors of Galena which the legislature could not take away.

6th. The acts of 30 June, 1857, did not undertake to repeal S. 4, of the act of 21 June, 1852, in relation to the tax to pay the principal of the public debt.

7th. The act of 6 Feb., 1865, did not undertake to repeal any part of the act of 21 June, 1852. It does not refer to it; the legislature could not repeal it as to the plaintiff's bonds issued on the faith of it.

8th. The act of 6 Feb., 1865, re-enacted the S. 3 of the taxation clause of the act of 1857, as to the levy of one per cent. to pay interest, except the last clause of the latter, which authorized more public debt. It simply re-enacts it, and is no bar to the plaintiff's

44 remedy in that respect.

9th. The act of 6 Feb., 1865, S. 15, repeals S. 2 of the general powers clause of the act of 1857, and the limitation of 2½ per cent. does not relate to the taxes for public debts, but to other subjects, and is no bar to plaintiff's writ.

10th. The repealing clause of the acts of 1857 and 1865, Feb. 6, continue in force all former acts that are not expressly repealed by that act, and is no bar to the relief sought.

11. The return is no bar to the relief soughtb, ecause it admits a right to levy a tax of two and a half per cent., of which one per cent. is expressly applied to plaintiff's interest, and the other not being appropriated to any specific purpose, the plaintiff is entitled to have it applied on his judgment.

12th. It is no bar to the relief sought, that the defendants' interest in 1866 to levy a tax of one per cent. to pay interest on the public debt, the plaintiff's included, or that defendants' powers are limited; the plaintiffs have made the proper demand, and is entitled to have all the taxes which be lawfully levied for that purpose applied

45 to his judgment, and the defendants do not show that have done, or will do this; wherefore, &c.

GRANT, *for Pl.*

Indorsed: Filed June 6th, 1866.

WM. H. BRADLEY, *Cl'k.*

On this day to wit, the 16th day of August, in the July term, A. D. 1866, of said court, in the record of proceedings thereof in said entitled cause, is the following entry, to wit:

Information for mandamus.

THE UNITED STATES, on the relation of Henry Amy,
vs.
THE MAYOR AND ALDERMEN OF THE City of Galena.

The demurrer of the relator to the return of the respondents, to the alternative writ of mandamus issued herein, having heretofore been submitted to the court, and the court being now fully advised thereon sustains said demurrer.

On this day, to wit, the 1st day of October, in the adjourned October term, A. D. 1866, of said court, in the record of the pro-
46 ceedings thereof in said entitled cause, is the following entry, to wit:

Information for mandamus.

THE UNITED STATES, on the relation of Henry Amy,
vs.
THE MAYOR AND ALDERMEN OF THE City of Galena.

Now come the respondents by their attorney and *and* move the court for leave to amend their return to the alternative writ of mandamus issued herein.

On this day, to wit, the 5th day of October, 1866, came said defendants by their attorneys, and filed in said clerk's office their motion in said entitled cause, which said motion is in the words and figures following, to wit:

Motion for leave to amend return.

United States circuit court for northern dist. of Illinois, October term, A. D. 1866.

UNITED STATES, ex rel. of HENRY AMY,
vs.
THE CITY OF GALENA *et als.*
Mandamus.

47 And now at this day come the said defendants, by McAllister, Jewett and Jackson, their att'ys, and move the court for leave to amend the return to the alternative writ of mandamus heretofore issued in said cause.

McALLISTER, JEWETT & JACKSON,
Att'ys for Respondents.

Indorsed: Filed October 5th, 1866.

WM. H. BRADLEY, *Cl'k.*

On this day, to wit, the 25th day of October, 1866, came said parties by their respective attorneys, and filed in said clerk's office their stipulation in said entitled cause, which said stipulation is in the words and figures following, to wit:

Stipulation for time to amend return.

United States circuit court for northern district of Illinois.

U. S., ex rel. HENRY AMY,
vs.
CITY OF GALENA.

U. S., ex rel. LUTHER CLARK *et al.*,
vs.
CITY OF GALENA. } Do.

It is agreed that the respondent may have twenty (20) days further time within which to prepare amendments to returns in
48 above-entitled causes, said 20 days to commence from this date thereof to be furnished to relators' counsel.

Chicago, Oct. 25, 1866.

GRANT, *for Plff.*
J. W. JEWETT, *for Respondent.*

Indorsed: Filed Oct. 25, 1866.

WM. H. BRADLEY, *Clk.*

49 On this day, to wit, the 15th day of November, in the adjourned October term, A. D. 1866, of said court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

Information for mandamus.

THE UNITED STATES, on the relation of Henry Amy,
vs.
THE MAYOR AND ALDERMEN OF THE City of Galena.

50 Now comes the relator, by James Grant, esq., his attorney, and it appearing to the court that the respondents had failed to make any amendment to their return to the alternative writ of mandamus, issued herein in conformity with the stipulation of the parties, filed the twenty-fifth day of October last, and electing to abide by their said return and the demurrer thereto, and the court having considered and being now fully advised in the premises, and on motion of said attorney, does now order that a peremptory writ of mandamus issue herein, commanding the respondents and their successors in office to levy, at their next regular term after the service of said writ upon them, a special tax on the taxable property of said city of Galena, of one per cent. to pay the principal, and *and* one per

cent. to pay the interests and costs in the judgments mentioned in the petition herein, and to pay the same out of the proceeds, and to continue to levy a like amount for each succeeding year until
51 said judgments, interest, and costs are wholly paid, as prayed for in said petition, returnable the third Monday of December next.

52 On this day, to wit, the first day of December, came said defendants, by their attorneys, and filed in said clerk's office their appeal bond in said cause, which said appeal bond is in the words and figures following, to wit:

Appeal bond.

Supreme Court of the United States, in error.

THE MAYOR AND ALDERMEN OF THE CITY OF Galena
vs.
THE UNITED STATES OF AMERICA, ex rel. Henry Amy.

Know all men by these presents, that the city of Galena, as principal, and Madison Y. Johnson, of said city of Galena, in the county of Jo Daviess, and State of Illinois, as surety, are held and firmly bound unto the United of America, or Henry Amy above-named, in the sum of five hundred dollars, to be paid to the said United States of America, or said Henry Amy, his executors or administrators, to which payment, well and truly to be made, the said city of Galena and the said Madison Y. Johnson, bind themselves, jointly, severally, and firmly by these presents.

In witness whereof the said city of Galena has caused these
53 presents to be signed by its mayor, and attested by its clerk, and its corporate seal to be hereto affixed, and the said Madison Y. Johnson has hereunto set his hand and seal, this 30th day of November, A. D. 1866.

Whereas the above-named the mayor and aldermen of the city of Galena, have prosecuted a writ of error to the Supreme court of the United States to reverse the judgment rendered in the above-entitled cause by the circuit court of the United States for the seventh circuit and northern district of the State of Illinois:

Now, therefore, the condition of this obligation is such that if the above-named the mayor and aldermen of the city of Galena shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

[SEAL.] LOUIS SHISSLER,
Mayor of the City of Galena.

Attest: JOHN McHUGH, *City Clerk.*

[SEAL.] MADISON Y. JOHNSON.

Sealed and delivered in presence of—
GEO. FERGERSON.

54 STATE OF ILLINOIS, *County of Jo Daviess, ss:*

Madison Y. Johnson, being first duly sworn, deposes and says that he signed the above and foregoing bond as security, and that he is worth the sum of ten thousand dollars and more, over and above all debts, liabilities, and legal exemptions.

MADISON Y. JOHNSON.

Subscribed and sworn to before me, this third (3d) day of December, A. D. 1866.

JOSEPH H. BARRY, *J. P.*

Approved.

THOMAS DRUMMOND.

Indorsed: Filed Dec'b. 1st, 1866.

WM. H. BRADLEY, *Cl'k.*

55 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States within and for said northern district of Illinois, do hereby certify the foregoing transcript, from pages one to fifty-four, inclusive, to be a true, full, and perfect copy from the record of all the proceedings which have been had in said court, in said matter of the United States, on the relation of Henry Amy, against the mayor and aldermen of the city of Galena, and other officers, as the original of the same now remain in my custody; and that the writ of error, and also the citation sued out by the said respondent and plaintiff in error are hereto appended.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said northern district, this fifth day of January, A. D. 1867.

[SEAL.] WM. H. BRADLEY, *Clerk.*

5-ct. rev. stamp, cancelled.

56 THE UNITED STATES OF AMERICA, *ss:*

To Henry Amy:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December instant, (A. D. 1866,) pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein the mayor and aldermen of the city of Galena are plaintiffs, and the United States of America, ex. rel. Henry Amy, are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice be done to the parties in that behalf.

Witness the honorable Thomas Drummond, judge of the circuit court of the United States for the northern district of Illinois, this first day of December, A. D. 1866.

THOMAS DRUMMOND.

Due service of the above and foregoing citation is admitted, this first day of December, A. D. 1866.

JAMES GRANT,
Attorney for Defendants in Error.

57 Circuit court of the United States for the northern district of Illinois.

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between the United States, on the relation of Henry Amy, plaintiff, and the mayor and aldermen of the city of Galena, defendant, a manifest error hath happened, to the great damage of the said the mayor and aldermen of the city of Galena, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf: You are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ,
58 so that you have the same at Washington on the first Monday of December, inst., in the said Supreme Court to be then and there held, that the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this first day of December, in the year of our Lord one thousand eight hundred and sixty-six, and of our independence the ninety-first year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

Supreme Court of the United States,

December Term, A. D. 1866.

THE MAYOR AND ALDERMEN OF THE CITY OF GALENA,

vs.

UNITED STATES OF AMERICA ex rel. HENRY AMY.

Error to Circuit Court of the United States for the Northern District of Illinois.

Brief and Argument for Plaintiffs in Error,

By JNO. N. JEWETT.

Beach & Barnard, Steam Printers, 122 & 124 South Clark St.

Supreme Court of the United States,

December Term, A. D. 1866.

THE MAYOR AND ALDERMEN OF THE CITY OF GALENA,

vs.

UNITED STATES OF AMERICA ex rel. HENRY AMY.

Error to Circuit Court of the United States for the Northern District of Illinois.

Brief and Argument for Plaintiffs in Error.

The writ of error in this case questions the correctness of the ruling and judgment of the court below, upon the demurrer of the relator to the return of the plaintiffs in error, to an alternative writ of mandamus.

The facts gathered from the pleadings and the law applicable to the case, material to be considered, may be briefly stated as follows: The city of Galena in the spring of 1855, issued its bonds, running ten years, for a large amount, in renewal of its indebtedness, by bond and otherwise, previously existing and matured, bearing interest at six per cent. per annum, payable annually. The larger portion of the interest on these renewed bonds was paid up to the time of their maturity. No provision, however, was made for the payment of the principal; and upon the maturity of the bonds, the relator sued the city upon the bonds held by him—the principal of which amounted to $16,000—in the Circuit Court of the United States for the Northern District of Illinois; and in January, 1866,

recovered a judgment against the city for $20,214.49, including interest and costs. At or about the same time, one Luther C. Clark, upon bonds held by him, the principal of which amounted to the sum of $1,500, recovered a judgment in the same court against said city, for $1,720.09, including interest and costs. This last judgment was shortly afterwards assigned to the relator. Executions were issued upon these judgments, payment thereof demanded, and the executions returned unsatisfied, the property of the city being by law exempt from levy and sale upon executions.

On the 21st day of February, 1866, the relator filed in said Circuit Court, his petition for a mandamus against the mayor and aldermen of said city and their successors, to compel them "to levy a "tax on the taxable property of said city of one per cent., to pay "the principal, and one per cent. to pay the interest and costs on "said judgment, and to continue to levy a like amount for each "succeeding year, until said judgment, interest and costs are "wholly paid." The petition is fully set out in the alternative writ of mandamus issued by the court upon said petition on the 24th day of February, 1866, returnable on the first Monday of March next ensuing.

The return to this alternative writ, filed May 22, 1866, first denies that the city of Galena, at the time of the demand, or subsequently, had any money or funds, with, or out of, which it could pay said judgment or any part thereof; and, secondly, it sets up certain provisions of an act of the General Assembly of the State of Illinois, entitled "An Act to reduce the law incorporating the "city of Galena, and the several acts amendatory thereof, into one "act, and for other purposes, approved January 30, 1857, and cer- "tain sections of an act of said General Assembly approved Feb- "ruary 6th, 1865," amendatory of the act aforesaid, as limiting the power of said city over the subject of taxation, and alleging that the city council, consisting of the mayor and aldermen of said city, in whom the power of taxation is vested, have, since 1857, exercised to its fullest extent, the power of taxation, conferred upon them

by said acts; and that the moneys collected by means thereof have been applied and fully exhausted, in accordance with the provisions of said acts; and that they intend, in the future, in good faith to all parties, to continue the exercise of said power to its fullest extent. The return then alleges that, owing to the great depreciation in the values of all property within the limits of said city, the amount authorized by said city to be levied for the payment of interest upon the city indebtedness—viz: one per cent.—is insufficient for that purpose; and that the like amount, authorized to be raised for the payment of the general and contingent expenses of the city, and constituting the general fund of said city, has not exceeded the ordinary and necessary expenses of carrying on and administering the government of said city. It states the principal of the city debt to be $142,272, and the assessed value of the property within the limits of said city, liable to taxation, $740,000; and the return insists that a peremptory mandamus should not be awarded, except as to the residue of the tax of one per cent. levied for the general and contingent expenses of said city, remaining after the payment therefrom of such expenses, and the necessary costs of administering the government of the city. To this return, the relator filed a demurrer, which was sustained by the court below; and the respondents standing by their return, an order for a peremptory writ of mandamus was entered, and the rulings and decisions of the court are assigned for error.

The provisions of the charter of the city of Galena, and amendments thereof, bearing upon the power of the city to tax, are conveniently divided, in considering this question, into those existing at the time of the issuing of the bonds upon which the relator's judgment was obtained, and those subsequently enacted and in force.

The only provision of the original charter of the city, approved February 15, 1839, conferring the power of taxation, is contained in the 19th section, which is as follows:

"Sec. 19. The city council shall have full power and authority "to assess, levy and collect taxes upon all property, real and per-

" sonal, within the limits of said city, except wearing apparel of " any person, and the necessary implements and tools of any per- " son, used in the exercise of his or her profession, trade or calling, " and to regulate by ordinance, the mode of collecting the same; " *Provided*, That no tax shall exceed the yearly rate of one-half " per centum upon the assessed value of the property taxed."

By act of the General Assembly of the State of Illinois, approved June 21, 1852, this power of taxation was enlarged. The following sections of said act relate to this subject:

" SEC. 2. That the city council of the city of Galena, shall be, " and are hereby authorized, in addition to the taxes now author- " ized to be assessed, levied and collected, to assess, levy and col- " lect a tax not exceeding one per cent. on the dollar, of the as- " sessed value of all real and personal estate made taxable in said " city, to defray the ordinary, contingent and other expenses of " said city, not herein otherwise provided for; which taxes shall " constitute the general fund for city purposes."

Section 3 authorizes the assessment, levy and collection of a school tax, not exceeding five mills on the dollar, to build and keep in repair school houses, purchase grounds for school houses, and maintain schools; and then follows:

" SEC. 4. That the city council of the city of Galena may, if the " said city council believe that the public good and the best in- " terests of the city require, annually assess, levy and collect, a tax " not exceeding one per cent. on a dollar on the assessed value of " all real and personal estate taxable in said city, in addition to all " other taxes levied and collected in said city, to be applied as fol- " lows, to wit: The fund so collected shall be kept separate, and " shall annually, on the first day of January, be apportioned and " paid over, *pro rata*, upon the funded indebtedness of the city " of Galena, as may be presented by the holders of the same, to " be entered as credits to that extent, in extinguishment of the " principal of said city indebtedness. A majority of all the alder-

" men authorized by law to be elected, shall be necessary to assess, " levy and collect said tax to pay said city indebtedness. This " section to continue and be in force, until the whole amount of " said city indebtedness, with the interest to accrue thereon, is " fully paid, and no longer."

Section 5 authorizes a special tax for improvement and lighting of streets.

The above are all the provisions relating to the power of taxation by the city of Galena, contained in the charter of the city and the amendment thereof, prior to, or at the time of the issuing of the bonds upon which the relator's judgment was recovered. In 1857, the General Assembly of the State of Illinois, passed an act entitled, "An Act to reduce the laws incorporating the city of " Galena, and the several acts amendatory thereof, into one act, " and to amend the same, and for other purposes," which was approved, and became a law February 30th, 1857:

In this law, as contained in the official publication of the laws of 1857, the subjects treated of are classified, and the different provisions of the law are arranged under appropriate headings, as "City boundaries," "Officers, their election and appointment," "Powers and duties of officers," &c. In the re-publication of this law, with the city ordinances, by authority of the city, this classification of subjects was made the basis of a division into chapters, and the subject "City council, its general powers and duties," was made chapter 4, and the subject "Taxation," was made chapter 5, changing somewhat, the order of subjects as contained in the volume of published laws; and in section 4 of chapter 4, and under the title of subject of "city council, its general powers and duties," is the following specifications:

" 2. To levy and collect taxes upon all persons and property, " made taxable by law, for State purposes, whenever the interests " of the city may require."

And in chapter 5, under the title or subject of " *taxation*," are the following provisions:

"SEC. 1. The city council shall have power, within the city, by "ordinance, to levy and collect, annually, taxes not exceeding one "per cent. on the dollar, on the assessed value of all real and per- "sonal estate and property within the city, and all personal pro- "perty of the inhabitants thereof, made taxable by the laws of the "State, for State purposes, to defray the general and contingent "expenses of the city, not herein otherwise provided for; which "taxes shall constitute the general fund."

"SEC. 2. To annually levy and collect a school tax, not ex- "ceeding five mills on the dollar, on all property taxable for State "purposes, for purchasing ground for schoolhouses, building and "repairing school houses, and supporting and maintaining schools."

"SEC. 3. To levy and collect taxes, not exceeding one per cent. "on the dollar per annum, on all property subject to taxation, to "meet the interest accruing on the debt of the city; and the city "council shall pass no ordinance, or resolution, incurring a debt, 'without, at the same time, making provisions for the levying "of a tax sufficient to meet the payment of the interest accruing "thereon, when payable."

Section 4 authorizes the levy and collection of taxes for the erection of a city hall, markets, hospitals, houses of correction, etc.

Section 5 authorizes the levying and collection of a tax by districts, for defraying one-half the expenses of erecting lamps and lamp posts, and lighting the streets; and, lastly,

Section 6 authorizes a poll tax for the improvement of streets, to be paid either in labor or in money.

In 1865, the General Assembly of Illinois passed an act, which was approved and became a law February 6th, 1865, entitled "An Act to amend an Act entitled 'An Act to reduce the law incorporating the city of Galena, and the several acts amendatory thereof, into one act, and to amend

the same, and for other purposes,' approved February 30th, 1857." The following are the only provisions of the act relating to the power of taxation, and needful to be mentioned.

"SEC. 12. The city council shall levy and collect a tax of one "per cent. on the dollar per annum, on all property subject to "taxation, which tax, when collected, shall be set apart for the "sole and exclusive purpose of paying the interest upon the pub- "lic debt of the city, whilst the same is in existence."

"SEC. 15. The second clause of the fourth section of that por- "tion of the act to which this an amendment, entitled "City "Council, its general powers and duties," is hereby repealed, and "in lieu thereof, it is hereby enacted as follows:"

"*Second.* To levy and collect taxes upon all persons and prop- "erty made taxable by law, for State purposes, whenever the in "terests of the city may require. *Provided*, however, that the "aggregate tax shall not exceed two and one-half per cent. per "annum."

Section 18 expressly repeals section 3 of that part of the act of January 30th, 1857, entitled "*Taxation*," or ection 3, of chapter 5, of the same act, as divided and published by the authority of the city.

"SEC. 19. All acts, or parts thereof, which conflict with the "provisions of this act, are also repealed, but nothing in this act "shall be so construed as to deprive the city council of any power "or authority conferred upon the same, by the act incorporating "the city, and the various acts amendatory thereof, except so far "as such powers and authority have been expressly modified or "repealed by this act, or the acts heretofore mentioned."

I have thus set forth, for the convenience of examination, all the provisions of the law bearing upon the questions submitted to

the court, and all that can be claimed to have any reference to the taxing power of the city of Galena, so far as they are known to me, and it appears that the second section of the law of 1852, was substantially re-enacted in the first section, under the head of "Taxation," in the law of 1857, and has not since been changed in any respect. That section 4, of the law of 1852, has not been re-enacted, and whether repealed or not, must depend upon the construction given to the laws of 1857 and 1865. That prior to the law of 1857, there was no special provision for a tax to pay the interest on the city debt, and that the provision for a special interest tax, as contained in section 3, under the head of "Taxation," in the law of 1857, has been substantially re-enacted in the law of 1865, with certain positive restrictions as to the application of this tax, to prevent its misappropriation. These substantial re-enactments of special provisions are, of course, not cumulative, but simply a reaffirmance of authority previously existing, with such modifications as are deemed necessary and proper. It is also apparent that the the second clause of the fourth section of the law of 1857, under the title of "City Council, its general powers and duties," is simply a designation, or enumeration of a power, or authority, to be exercised by the city council, limited and restricted by the provisions of the same law under the title "Taxation," and that it was not intended to grant a general and unlimited authority to tax, so that the provisions of these several laws, necessary to be considered in this case, are narrowed down to the fourth section of the law of 1852, the first and third sections under the title "Taxation," of the law of 1857, and the modifications, if any, effected by the law of 1865.

Waiving, for the present, all questions respecting the sufficiency of the alternative writ of mandamus, I submit, that the only powers of taxation conferred upon city councils by the laws above created, the exercise of which can or ought to be enforced by the court, in these proceedings, are granted by the 1st and 3d sections, under the title "Taxation," (chapter 5, as the law is published by authority of the city, and referred to in the return) of the law of

1857, or in lieu of the 3d section of said law, the 12th section of the law of 1865, and it is immaterial whether the 4th section of the law of 1852 is in force, or whether it is superseded or repealed by the subsequent acts of 1857 and 1865.

The 4th section of the law of 1852, vested in the city council a discretionary power. The language is, "that the city council of "the city of Galena may, *if the said city council believe that the* "*public good and the best interests of the city require, annually* "*assess*," etc. There is no allegation in the alternative writ that the city council believe that the public good and the best interests of the city require the levy of the tax, nor is there anything in this record from which the court can infer any such belief. When the belief of the council has been formed and expressed, favorably to the levy of the tax, the court may then compel the levy; but this judgment cannot be forced; belief cannot be compelled; nor can the judgment or belief of the court, be substituted for the judgment or belief of the council. The power to levy the tax is conditional, dependent upon the belief or judgment of the city council. The court, in a proper proceeding, may compel an expression of that belief or judgment, but it cannot arbitrarily, and without regard to that belief or judgment, compel the exercise of the power which is dependent upon such belief or judgment. The learned judge, before whom the case was heard in the court below, in holding otherwise, announced this, to me, novel doctrine, that under the circumstances disclosed in this record, *it is bad faith*, on the part of the corporation officers, not to exercise this discretionary power to tax, supposing the law of 1852 to be in force, and the power therefore ceases to be discretionary, and the court may compel its exercise. And this is said upon a record in which the question of good faith or bad faith is not raised, without any opportunity, on the part of the persons accused, to contest the charge; without any evidence upon this subject other than the fact of indebtedness, and in the face of the statement in the return, that these offieers have exercised, and intend to exercise, the powers given to them, *in good faith*, toward all parties, the relator included. In this view of the matter, there is no such thing as a

discretionary power vested by law in an individual or public officer; for all the court has to do in any such case, is to differ in opinion with the individual, or officer, upon the question of *good faith*, upon, it may be, some imperfect or partial view of the facts, and immediately the discretion is transferred from the proper depository, under the law, and vested in the judge or court. It is a point well put in the case of Milligan, and others, just decided in this court, that, at all times, and under all circumstances, the highest, as well as the lowest officials of this government, are bound by the constitution and laws as they are made, and the judicial department must not, and, I trust, will not, constitute itself an exception in the application of a principle so just and salutary. Where the law has vested a discretion, there let it remain; where the law gives the right of private or official judgment, let the court see to it that the right is preserved as the law has established it; for before the law the judgment and belief of the mayor and aldermen, of the city of Galena, in the sphere of action assigned to them, is as sacred, and as much entitled to protection, as the judgment and belief of the highest judicial tribunal in the land. Language, better adapted to vest a discretionary power, could not be devised, than that contained in the law under consideration. "The city council of the city of Galena may, *if the city council believe the public good and the best interests of the city require it*," etc. But the learned judge says: "If ever this faculty is to be called into action, why not now? Is it not clear that the public good, in its largest and truest sense, and the best interests of the city, do require it?" Now the fair and legitimate answer to these questions is the law itself. All the world beside, the court included, may believe "that the public good, and the best interests of the city, in its largest and truest sense, do require it," and yet the city council, to whose belief alone the law pays deference in this matter, may believe otherwise, and may for reasons satisfactory to itself, and upon a state of facts known only to them, decline to exercise the power. The fallacy of the position consists, in fact, in putting the court above the law, and in the abrogation of the law itself by the court, on account of some fancied

equity in favor of the corporation creditor. It may be conceded that these judgments ought to be paid; that the relator is entitled to his money; but this equity is not stronger than the law An arbitrary power to override the law is as dangerous in the hands of a judge, as of a president, or commander-in-chief, and the pretext for doing it is wholly immaterial. Equity, in itself, is commendable, and to be striven for by all lawful means. So is religion, and yet the world has been drenched in blood in the name of religion, and the most diabolical outrages upon private and municipal rights have been perpetrated in the name of "liberty, equality and fraternity." Neither in law or politics can it be said that the end sanctifies the means. Only lawful means can safely be used to secure lawful purposes. So long as the law stands, and is administered as it stands, there is something which can be referred to as a standard—something by which the rights of individuals and communities may be determined; but when, upon any pretence, whether of equity, or whatever else, a court, organized to administer the law, assumes to abrogate it, or substitute its judgment for the judgment which the law appoints, then the standard is broken down, and the law becomes of no avail, either for protection or defence. If this law of 1852 is in force, the relator cannot complain, for it has not been changed since the bonds were issued, and he knew then, as well as he knows now, that so far as the payment of his bonds depended upon the exercise of the power conferred by that law, it was at the discretion, and rested in the belief and judgment of the city council of the city of Galena. Being presumed to know the law, he must have known, and did know, that the court had no authority to compel the exercise of that power, until the city council believed the public good and the best interests of the city required it, and neither he nor the court, under that law, has any right to say, that the public good and the best interests of the city require that his debt shall be paid. In no just sense can it be said that the payment of his debt is, or would be, a *public good.* Nor can it be said, judicially or otherwise, to involve the best interests of the city. At most, it is but a private matter, and the *good* of it, if any, a private good. The consider-

ations, therefore, which are to influence the belief or judgment of the city council, are not involved in this case, at least, not necessarily so; nor does it so appear in any part of the record, and it is a false assumption, both of cause and effect, so to regard it.

My position, then, is this, that the 4th section of the law of 1852, above quoted, vests in the city council a power, to be exercised or not, according to their judgment or belief, regarding the public good and the best interests of the city; that it by no means *necessarily* concerns the public good, or the best interests of the city, that the relator's judgment should be paid; that private good and private interests, no matter how they may be affected by the action or non-action of the city council, cannot be urged as a reason for the exercise of the power; that the belief of the city council that the public good and the best interests of the city require the exercise of the power, is a condition precedent to its exercise; that the court cannot compel the city council to believe in a particular way, and therefore ought not to interfere by mandamus to compel the exercise of the power, until that belief is determined and expressed; that the only jurisdiction in the matter, which the court has, is to compel an expression of the belief of the city council, to set the council in motion to ascertain what its belief or judgment is, upon a proper application for that purpose; and if, after due examination, the belief or judgment of the council, so ascertained, is "that "the public good and the best interests of the city require" the levying of the tax, the court may, if the levy is not made, compel the exercise of the power—otherwise not; that the proceeding, so far as it relates to, or includes the exercise of, the power vested in the city council by the law of 1852, is premature or fatally defective, in not alleging any foundation for the exercise of the power in the belief or judgment of the city council.

In support of these views, I refer the court to the following cases, which seem to me pertinent and conclusive of this part of the case:

Matter of John King, 7 East., 92, (note A);

King v. *Justices of Kent*, 14 East., 395;

King v. *Archbishop, &c.*, 15 East., 117;
Giles' case, 2 Strange, 881;
Rex v. *Young et al.*, 1 Burr, 561;
People ex. rel. v. *Supervisors of Albany*, 12 John., 414;
Hull v. *Supervisors of Oneida*, 19 Johns., 259;
Gunn's Adm'r. v. *County of Pulaski*, 3 Pike, 427.

In the case above cited, from 15 East., Lord ELLENBROUGH, C. J. at page 139, says:—"There is no instance of such an application for a mandamus to compel a bishop to *approve*; we can only compel him to inquire; we cannot divest him of that function, which the legislature has, for wise purposes, vested in him, and transfer it to ourselves. All the court can do is to see that the function is well exercised by him in whom it is vested; and there never yet has been an instance of a mandamus to compel a bishop to approve and license a lecturer, when the question turned on the approbation or disapprobation of the bishop, as to the fitness of the applicant." And again, upon page 157: "It seems to me, therefore, that unless we repeal the act of parliament, and violate the functions which are exclusively vested in the bishop, and others under the act, we cannot grant the mandamus that is prayed for; and that in refusing it, we contravene no principle of law that has ever been established, nor run counter to any one dictum of any one judge, pronounced in any cause in which a question of this nature, respecting the exercise of the functions of a bishop, has ever occurred before the court."

The same learned Judge, in 14th East., (which was an application for a mandamus to compel the justices to fix the rate of wages, under a statute which gave them authority so to do in their discretion) at page 400, says: "We do not, however, by granting this mandamus, at all interfere with the exercise of that discretion which the legislature meant to confirm to the justices of the peace in sessions; we only say that they have a discretion to exercise,

" and, therefore, they must hear the application; but having heard " it, it rests entirely with them, to act, or not, upon it, as they think " fit."

In the 12 Johns. there was an application for a mandamus to compel the supervisors to allow a claim for services, and SPENCER, J., delivering the opinion of the court, at page 415, says: "Should " we grant a peremptory mandamus, what would be its command? not, certainly not to allow any specific sum; that would be taking good upon ourselves a discretion which the legislature has vested in " the supervisors; we could only command them to examine the ap- " plicant's account, and in the words of the statute, allow him for " his services, such sum as they shall judge he reasonably deserves " to have."

The case in 19 Johns. was upon an application for a mandamus to compel the supervisors to audit and allow a claim of the relator, which the supervisors had refused to consider, alleging that they had no authority. The court cites with approval, the case of *King* v. *Justices of Kent*, 14 East., and at page 261 says: "The distinc- " tion recognized by us is, that when the inferior tribunal has a " *discretion*, and proceeds to exercise it, we have no jurisdiction to " control that discretion by mandamus; but if the subordinate public " agents refuse to act, or to entertain the question for their discre- " tion, in cases where the law enjoins upon them to do the act " required, it is our office to enforce obedience to the same by man- " damus, in cases where no other legal remedy exists; and at page 263: "The question now presented, is whether the supervisors " were bound to audit and allow the account as a county charge? " If it be a legal claim, then we have no doubt of our jurisdiction " to instruct and guide the supervisors in the exercise of this duty, " by mandamus; not to control their discretion in judging what is " a reasonable compensation for such services, but to compel them " to admit the claim as a county charge, and to exercise their dis- " cretion as to the amount, or, in the language of Lord ELLEN- " BOROUGH, in the case before cited, this court would interfere so " far as to set the inferior jurisdiction in motion."

These cases are regarded as clearly establishing the doctrine for which I contend. The city council were authorized to assess, levy and collect a tax, under the 4th section of the law of 1852, if they believed the public good and the best interests of the city required it. If this section is still in force, it may be that, as a judgment creditor, the relator has a right to an expression of the belief of the city council upon this question; and upon a refusal of that expression, that the court would aid him in obtaining it by mandamus; but the court can go no farther than to compel action by the council—to set it in motion. It cannot say to the council how it shall believe or judge, much less can it overleap that belief and judgment, or ignore its necessity, and arbitrarily command the exercise of the power thus conditionally granted.

If this view of the case shall be sustained by the court, then there only remains to be considered, the law of 1857, as modified by the law of 1865.

It will not be contended, I suppose, that either the city council, or the court, can lawfully divert the special tax for the support of schools, or the tax for lamps or lamp-posts, or any tax authorized by law for a specific purpose, from the purpose for which it was authorized; so that there are left only the 1st and 3rd sections of the law of 1857, or in lieu of the 3rd section, the 12th section of the law of 1865, the latter, after its enactment, taking the place of the former—and they being substantially the same. The 1st section of the law of 1857, under the title "*taxation*," authorizes the levy and collection of a tax not exceeding one per cent. on the dollar, to defray the general and contingent expenses of the city; the same to constitute the general fund. The 3rd section and the 12th section of the law of 1865, authorizes the levy and collection of a tax not exceeding one per cent., to pay the interest upon the city indebtedness. The return alleges that both these taxes have been levied, and as far as practicable collected, since the passing of the law of 1857, and have been faithfully and properly applied to the purpose intended; that the ordinary and contingent expenses of the city

government, and the necessary cost of administering it, have at all times been equal to, or in excess of, the tax of one per cent. levied and collected under the 1st section, and that the interest of the city debt has annually exceeded the amount realized from the one per cent. interest tax. It further alleges that these taxes have been uniformly levied, collected and paid, and that the city council intend in the future, in good faith to the city and its creditors, (the relator included), to continue so to do. It also states that without the aid of the taxes levied under the first section of the law of 1857, under the head of "*taxation*," the government of the city cannot be administered or carried on; and all these allegations are admitted by the demurrer to the return.

The court will not grant a mandamus to compel a party to do that which he is ready and willing, and offers to do, and which he has been doing continuously, for there the writ is clearly unnecessary.

Tappan on Mandamus, (marginal p.) 15 & notes.

It could subserve no useful purpose for the court to command the city council to levy the tax of one per cent. to pay the general and contingent expenses of the city, or the tax of one per cent. to pay the interest on the city debt, for both these taxes, the return alleges, have been heretofore levied and collected, and will continue to be levied and collected, and the demurrer admits the truth of the allegation; and the final order of the court below shows that it was not the intention that the taxes directed to be levied, should be levied in the exercise of the power given by the 1st and 3rd sections under the head of taxation, of the law of 1857, or the 12th section of the law of 1865, for the order is for a peremptory writ of mandamus, commanding the respondents and their successors in office to levy a *special* tax of one per cent. to pay the principal, and one per cent. to pay the interest and costs of the relator's judgments, and such a command is neither in form or substance concurrent with the provisions of said sections. If, then, this command is not based upon the authority veited in the city council by these provisions of

the law, upon what foundation does it rest? There is not, either in the petition, the alternative writ, or the return thereto, or in any law brought to the knowledge of the court, or of which the court can take notice, any other power or authority, the exercise of which by the council the court can or ought to compel; and it therefore follows that the court has ordered a peremptory writ, with the command of which the respondents have no power to comply.

If, however, it was the intention of the court below to enforce by this order, and the writ to be issued in pursuance of it, the exercise of the power given to the city council by the 1st section under the title "taxation," of the law of 1857, and the 12th section of the law of 1865, then the order is erroneous, for this further reason that it attempts to force the levies of taxes under the provisions of those sections, for purposes not authorized by the language of the law. Under said 1st section the city council is authorized to levy a tax to defray the ordinary and contingent expenses of the city; and under the 3rd section of same law, under same title, or what is the same thing, under the 12th section of the law of 1865, the city council is authorized to levy a tax to pay the interest accruing upon the city debt; but the order is, that a writ issue commanding the council to levy a specific tax—a *special* tax—to pay the principal and interest and costs of relator's judgments. If it was the intention of the court to compel the exercise of the power given by these sections, and to give to relator the exclusive benefit of the exercise of that power, the order should have been for a writ commanding the levying of the taxes, according to the provisions of those sections, and the payment of the moneys realized thereby, upon the relator's judgments, so far as necessary, making the proper distinction between principal and interest.

There is another question arising here, which it may be proper to suggest, and that is, will the court, for the purpose of paying a creditor, deprive the authorities of the city of the means of carrying on and administrating the government of the city? The return

states that the taxes raised under, and in pursuance of the 1st section of the law of 1857, under the title "taxation," are necessary for the carrying on of the city government; and the very language of the law indicates that this was the purpose for which the tax was authorized. True, it was to constitute the general fund; the surplus not necessary for the ordinary and contingent expenses of the city, may therefore be subject to the control of the court by mandamus, but can the court appropriate the whole to the payment of a creditor, without regard to the necessary expenses of administrating the city government? It is submitted, without further argument, that municipal governments will not and cannot be thus crippled and paralyzed by the courts; and that upon the same principle, that they are not subject to the process of garnisheement, they are not liable to have the funds needful to the proper execution of their powers, and the performance of their duties, withdrawn from their control, or directed from their legitimate purposes.

Itwas objected to the return, that it does not set forth how, or in what manner, the funds raised by the taxes admitted to have been levied and collected, have been applied; and this objection was sustained in the court below. The return alleges, that the moneys raised by the tax of one per cent. under section 1st of the law of 1857, under title "taxation," have been properly applied and expended in defraying the general and contingent expenses of the city, and that the one per cent. interest tax has been already expended in the payment of interest upon the city debt; and it is insisted that this is proper and sufficient. An alternative writ of mandamus is not a bill of discovery, nor is this proceeding an inquisitorial, or even an equitable one. It is strictly and technically a proceeding at law. The writ and the return are pleadings in the cause, and a pleading which alleges the performance of a duty imposed by law, substantially in the language of the law, is good. If the appropriation of the funds was material, and the relator had any reason to question their application, the allegation of the return in this respect was issuable, and it was his place to

traverse it. The question of lawful and proper appropriation would then have been presented for trial in a legitimate manner.

In addition to the reasons above urged against the order of the court below, it is submitted, that the alternative writ in this case was fatally defective and insufficient; and even if the return was defective, the demurrer should have been carried back and sustained to the writ itself. It is a familiar doctrine, that a demurrer reaches back to the first substantial defect in the pleadings.

The objection to this alternative writ is, that it contains no averment of any fact entitling the relator to the relief sought. An inspection of the writ shows that it contains but a single allegation, and that is, that the relator filed in the Circuit Court "an in- "formation for a writ of mandamus, &c., in the words and figures "following"; then follows a copy, or what purports to be a copy, of the paper styled "an information." Independent of what appears in this copy, there is no allegation of any indebtedness of the city of Galena, or of any judgment against the city, or of any right in the relator to ask, or power in the respondents to grant the relief expressed in the commanding part of the writ. There is therefore nothing in the writ to answer or plead to, excepting this copy of "information."

The writ should embody, in the form of proper averments, the facts or conclusions of the court issuing it, deduced from the petition or other documents presented to the court, and upon which the writ is asked.

Commercial Bank v. *Canal Com'rs*, 10 Wend., 26.

"An alternative mandamus becomes the foundation of all sub- "sequent proceedings in the case. It answers the same purpose "as the declaration in ordinary actions. It must show on its face "a clear right to the relief demanded by the relator. He must "distinctly set forth all the material facts on which he relies, so "that the same may be admitted or traversed. The defendant is

" called upon to perform the particular act sought to be enforced, " or, by a return, deny the facts alleged in the writ, or state other " matters sufficient to defeat the relator's application. *He is not " required to answer the petition on which the writ is ordered.* This " is well established practice in the proceeding by mandamus."

Canal Trustees v. *The People*, 12 Ill., 248.

Returning to the writ in this case, it will be seen that the only traversable averment which it contains, is in relation to the filing of " an information" for a writ. If the respondents answer anything more, they must answer to the petition or "information" on which the writ was ordered, and this they cannot be required to do.

See also—

The King v. *Margate Pier Co.*, 3 B. & Ald., 220;
Clark v. *Company of Proprietors*, 6 A. & E. (N. S.), 898;
The State v. *Jones*, 1 Iredell, 129;
People v. *Ransom*, 2 Comstock, 490.

The cases above cited also establish the doctrine, that it is not too late to object to the sufficiency of the writ after the return is made; and that a demurrer to the return reaches back to substantial defects in the writ itself.

It is insisted, therefore, that the Circuit Court erred in sustaining the demurrer to the return, and in ordering a peremptory writ of mandamus to compel the levy and collection of a tax of one per cent. to pay the principal, and one per cent to pay the interest and costs of relator's judgments, because—

1st. The 4th section of the law of 1852, if in force, vests a discretion in the city council which the court cannot lawfuly control.

2nd. The city council has no power to levy and collect taxes for the purposes contemplated by the order of the court, the exer-

cise of which can be compelled by the court, excepting under the 1st and 3rd sections under the title of "taxation," of the law of 1857, or in lieu of said 3rd section, the 12th section of the law of 1865; and this power, the order of the court compels the city council to exercise for the sole and exclusive benefit of the relator, without regard to the legitimate necessities of the city government, or other proper and necessary expenses of the city.

3rd. The order is to levy and collect a special tax of one per cent. to pay the interest and cost accrued and to accrue on relator's judgments, without regard to the amount of said interest and costs, or the amount of the tax so to be realized.

4th. The order requires the levying of a *special* tax for the payment of the principal, and a *special* tax for the payment of the interest and costs of relator's judgments, without designating the law or provisions of law, by authority of which such special taxes shall or can be levied; and in fact in the absence of any power in the city council of the city of Galena to impose such taxes.

5th. The alternative writ of mandamus is defective in substance, and the demurrer to the return should have been carried back and

Relator's counsel claims, that in the court below I waived the objections here taken to the sufficiency of the alternative writ, and that, but for such waiver, he would have amended. I did not so understand the matter; nevertheless, in deference to his understanding, I withdraw those objections, and agree that, for the purposes of the hearing in this court, said writ shall be considered sufficient.

JNO. N. JEWETT.

" called upon to perform the particular act sought to be enforced, " or, by a return, deny the facts alleged in the writ, or state other " matters sufficient to defeat the relator's application. *He is not* " *required to answer the petition on which the writ is ordered.* This " is well established practice in the proceeding by mandamus."

Canal Trustees v. *The People*, 12 Ill., 248.

Returning to the writ in this case, it will be seen that the only traversable averment which it contains, is in relation to the filing of " an information" for a writ. If the respondents answer anything more, they must answer to the petition or "information" on which the writ was ordered, and this they cannot be required to do.

See also—

The King v. *Margate Pier Co.*, 3 B. & Ald., 220;
Clark v. *Company of Proprietors*, 6 A. & E. (N. S.), 898;
The State v. *Jones*, 1 Iredell, 129;
People v. *Ransom*, 2 Comstock, 490.

The cases above cited also establish the doctrine, that it is not too late to object to the sufficiency of the writ after the return is made; and that a demurrer to the return reaches back to substantial defects in the w

It is insisted, ther
ing the demurrer to
of mandamus to c
per cent. to pay the
and costs of relator'

1st. The 4th sect
cretion in the city co

2nd. The city council has no power to levy and collect taxes for the purposes contemplated by the order of the court, the exer-

cise of which can be compelled by the court, excepting under the 1st and 3rd sections under the title of "taxation," of the law of 1857, or in lieu of said 3rd section, the 12th section of the law of 1865; and this power, the order of the court compels the city council to exercise for the sole and exclusive benefit of the relator, without regard to the legitimate necessities of the city government, or other proper and necessary expenses of the city.

3rd. The order is to levy and collect a special tax of one per cent. to pay the interest and cost accrued and to accrue on relator's judgments, without regard to the amount of said interest and costs, or the amount of the tax so to be realized.

4th. The order requires the levying of a *special* tax for the payment of the principal, and a *special* tax for the payment of the interest and costs of relator's judgments, without designating the law or provisions of law, by authority of which such special taxes shall or can be levied; and in fact in the absence of any power in the city council of the city of Galena to impose such taxes.

5th. The alternative writ of mandamus is defective in substance, and the demurrer to the return should have been carried back and sustained to the writ itself.

6th. The return itself is sufficient, and shows that the city council has done, and is doing, all that by law it is or can be required to do in the matter of levying taxes for the payment of the principal and interest of its debt.

And for these reasons it is insisted that the order of the Circuit Court should be reversed.

JNO. N. JEWETT,

Att'y for Pl'ffs in Error.

SUPREME COURT OF U. S.

DECEMBER TERM, A. D. 1867.

MAYOR &c. OF CITY OF GALENA
vs.
U. S. EX REL. HENRY AMY.

Reply to brief of defendant in error.

The singular character of the argument of the Relator's counsel, compels a few words in reply. It is the first time in my professional experience, that I have known the opinion of the Court below, in the case under review, to be cited as the principal authority for the correctness of the decision sought to be reversed; and I certainly do not feel at liberty to criticise that opinion as I would the mere argument of counsel, although counsel by adoption has for the purpose of this hearing made it his own. This much, however, I may be permitted to say, that in this day of multiplied authorities, that opinion, whether of court or counsel, has but a slender foundation, which has no support outside of itself.

It is useless in this case to talk about the equities of creditors. The question is one of *power in the court to compel* the levy of a special tax for the payment of the Relator's judgment. It is no matter what the assessed value of the taxable property within the limits of the city of Galena is, it may be five times, or a thousand times the amount of the city debt, and in either case, if the law has not vested in the City Council the power to tax the property for the payment of the debt, no tax for that purpose can be levied. And if the power which the city council has by law, to levy taxes for this purpose is so limited by the law, as that its due exercise is made dependent upon the deliberate judgment of the City Council, then the court has no jurisdiction to compel the exercise of that power, for

in doing so it would usurp the judgment which the law, for wise reasons, has vested elsewhere. The counsel has referred to the case of Mason *vs.* Fearson, 9 Howard 248, as the leading case relied on in a brief, filed by him I presume, in case No. 280, now pending in this court, and to which brief he directs attention, as containing the doctrine applicable to this case. The learned counsel has not furnished me a copy of that brief. It is, therefore, impossible for me to reply to it; but as the case in 9th Howard is mentioned as the leading case, I may be permitted to judge of the whole by the example put forward, and in doing so, I must pronounce the whole brief inapplicable here. A mere reading of the law to which a construction was given in the case of Mason *vs.* Fearson, shows it to have been essentially different from the 4th section of the law of 1852, under consideration here; there the law provided that it should be lawful for the officer to apply proceeds of the sale of one lot of land to payment of taxes upon other lots owned by the same party.

Two lots were sold for enough to pay the taxes assessed upon twenty; nevertheless the officer sold the twenty lots. The Court holds it was a law intended for the benefit of the owner, and gave no discretion to the officer; that it was his duty under the law to apply the proceeds of the sale of the two lots to the payment of the taxes on the whole. It is stated in the opinion of the Court below, that "the Mayor and Aldermen of the city are just as much, to the extent of the interest involved, the trustees of the creditors as they are of their immediate constituents, and they owe fidelity as much to the one as to the other." I do not object to this; but what then? Evidently it follows that in the exercise of the judgment which the law has given them, they must consider not only the interest of the creditor, but also the interest of their constituents; or as the law has it, "the public good and the best interests of the city." Was there any such judgment confided to the officer under the law before the Court in the case of Mason *vs.* Fearson? It is useless and cumbersome to cite cases which have no point of resemblance to the one before the Court; and without having had time to examine, I can only say that I doubt very much if any one of the cases cited in 9th Howard is, as the counsel for Relator claims, "precisely like the case now before the Court;" or if there is one such case decided by a court in favor of the construction contended for by the learned counsel, it stands alone, unsupported

by reason or authority, and in direct opposition to the language of the law and the settled doctrine of the highest courts in this country and in England.

The case of the Postmaster General *vs.* United States, ex rel. Stokes, 12 Peters, 524, referred to in my former argument, decides that the performance of a merely ministerial act may be compelled by mandamus; but the clear intimation of the opinion is, that if the law entrusted to the officer the exercise of a judgment or discretion in the matter, the Court could not compel the performance of the act. It is conceded that when the law vests a power in an officer by the words "*may*" or "*it shall be lawful,*" or "*it may be lawful,*" without other qualification, the courts, in order to carry out the intention of the law-makers, construe these words to mean "*shall;*" but I am at a loss to understand that system of philology which construes the words "*the City Council of the city of Galena may, if the said City Council believe that the public good and the best interests of the city require, annually assess,*" &c., *into* "*the City Council of the city of Galena shall annually assess,*" &c. Such a construction not only converts *may* into *shall*, but denies any meaning to the subsequent clause. Convert *may* into *shall*, in the law under consideration, and there is still left all I am contending for; and this is as far as the case of Mason *vs.* Fearson goes; and if the case in 17 Iowa, referred to by Relator's counsel, which I cannot examine beyond the quotation made by him, goes further, it is an exceptional one, which, like the opinion of the Circuit Court in this case, can only be supported by a reference to itself. I judge, however, from the statement of the case in 17th Iowa, made by the counsel, that the law, there under examination, was similar in its language granting the power to the one in Mason *vs.* Fearson, and under the circumstances of the case was properly subject to the same rule of construction, and that what is said, if anything, in the opinion of the Court beyond this, is mere *dictum*, not necessary to the determination of the question before it, and therefore not to be regarded as an authority in any respect.

I have confined these suggestions in reply to Relator's counsel to the law of 1852, because he claims that the levy of one per cent to pay the principal of Relator's judgments, commanded by the order of the Court below, and to be enforced by a peremptory writ of mandamus, is to be made under that law, and I have said here

and in my former argument, all that I desire to say upon this part of the case; simply adding, that I hope, I have made myself intelligible to the Court, although the counsel for the Relator on the 19th page of his argument, grossly misrepresents my position.

I do not understand that this is a case, or that this is the forum for the display of feeling or fancy; but as the opinion of the Court below, made part of the argument of the Relator's counsel, and the counsel himself in the other parts of his argument, indulge in many forebodings and suspicions, it may be permissible, for me to say, that this is not a case of repudiation on the part of the city of Galena, either actual or construction; but that the condition of the city, as a municipal government, is that of absolute bankruptcy; the return states that the actual values of property within the city has greatly depreciated since 1855. The fact more exactly stated is that the assessed valuation has fallen off from about $2,500,000 to about $650,000, whilst the actual values have diminished in a still greater ratio. Its debt is therefore about one-fourth of the value of all the taxable property within the limits of the city. The City Council may well hesitate in the exercise of the judgment which the law has vested in it, whether it should, in addition to the numerous and heavy taxes imposed upon the people by the Government, State and National, impose other taxes for the payment of its individual creditors; and the council may well and honestly decide, that the "public good and the best interests of the city require" that no such additional burden should now be imposed upon their constituents, notwithstanding the claims of the city creditors; the Court below and Relator's counsel talk as though the property of the citizens of Galena was at the disposal of the city to pay this large debt. It is sufficient to say, that this is not so: the city has only such power over this property, as the law has given it, and that is a limited power to tax it for certain purposes.

Again the Court below, and the counsel complain that the return does not show specifically how former taxes had been applied. That is immaterial. The command of the alternative writ is, that the Mayor and Alderman levy a tax to pay the principal and interest of Relator's judgment or show cause to the contrary. It does not call upon them to pay the judgement out of past taxes or moneys on

hand, but taking it for granted, that the city has no money, insists upon future taxation to meet the Relator's claims.

I submit, in conclusion, that the Relator gained no preference by his judgment over other creditors If, as the Court below expressed it, the Mayor and Alderman are trustees, then the fund which they administer is a trust fund, for the benefit of all creditors alike, and against such a fund a judgment, and execution creates no lien, and therefore gains no priority of right. Upon the theory of the Court and counsel, therefore, the judgement of the Court is erroneous, for it gives a preference to the Relator, when the law does not admit of preference. The whole debt of $142,000 and upwards, is admitted by the city, and it is all due—and yet the judgment in this case is that one per cent for principal and one per cent for interest, be levied and paid to Relator annually, until his judgment, interest and costs are paid, and that too, regardless of the amount of interest which may be accruing upon his claim. Can this be under the law as it now stands?

JNO. N. JEWETT,
Attorney for Plaintiff in Error.

In Supreme Court of the United States

THE MAYOR AND ALDERMEN Of the City of Galena, } Plaintiffs in Error.

THE UNITED STATES EX. RE. HENRY AMY, } Defendant in Error.

From the Circuit Court of the United States for the Northern District of Illinois.

Argument for the Defendant in Error.

— BY —

JAMES GRANT.

In the Supreme Court of the United States.

DECEMBER TERM, 1866.

THE MAYOR AND ALDERMAN OF THE CITY OF GALENA,
Plaintiffs in Error.
vs.
THE U. STATES *ex.rel.* HENRY AMY,
Defendant in Error.

In error from the Circuit Court for the Northern District of Illinois.

CASE.

The relator files an information for a mandamus, alleging that, on the 16th day of January, A. D. 1866, he recovered judgment for principal and interest of certain bonds of the City of Galena, issued as appears by the judgment record in 1852; that he is the assignee of a judgment on similar bonds, recovered on the 16th day of January, A. D. 1866, in favor of Luther C. Clark; that by an act of June 21st, 1852, the General Assembly empowered the city council of Galena to levy a specific tax of one per cent., to pay the interest on its funded debt, and this tax has not been levied. That by an act of June 30th, 1857, the city council was authorized to levy, 1st, a tax of one per cent. for general and contingent expenses—2d, five mills for school purposes—3d, one per

cent. to pay interest on public debt—4th, an unlimited tax for market halls, &c., and other public improvements. That none of the taxes to which the plaintiff, as a bond creditor has a right, had been levied, and applied to his principal or interest after a period named long past, and he prays for a mandamus to compel a continuous levy under the acts of 1852 and 1857, one per cent. to pay principal and one per cent. to pay interest, until his whole debt shall have been paid. An alternative writ was issued, setting out the information in bill.

The defendants answer, that in 1865 they levied a tax of one per cent. to pay interest on public debt, and it has been applied to a proper and lawful purpose; but they do not aver that any part of it was applied to the payment of the plaintiff's interest. They say that the debt of the city is about $142,000.00, and the taxable property, $140,00.00.

They set up in bar of the plaintiff's right, an act of the Legislature of February, 1865, by which their power of taxation is limited to one per cent. to pay interest on the public debt, and a total tax of $2\frac{1}{2}$ per cent. in all, and aver thatthis act prevents them from complying with the alternative writ.

The relator demurs to this return as insufficient, and assigns a number of different causes of demurrer; bnt we propose to consider them under the various acts of the Legislature, in relation to the bonds and interest of the City of Galena, instead of the special causes in the order set forth.

We will here set out all the acts of the General Assembly which relate to this subject.

The General Assembly, by an act entitled, "An act to amend the several acts incorporating the City of Galena," in force June 21st, 1852, (see session laws, 1852, page 77,) provided, as follows:

"§4. That the city council of Galena, may, if the said

city believe that the public good and the best interests of the city require it, annually assess, levy and collect a tax not exceeding one per cent. on the dollar, of the assessed value of all real and personal estate taxable in said city, in addition to all other taxes levied and collected in said city, to be applied as follows :

"The fund so collected, shall be kept separate, and shall annually, on the 1st day of January, be appropriated and paid over, *pro rata*, upon the funded indebtedness of the City of Galena, that may be presented by the holders of the same, to be entered as credited upon, and to that extent in extinguishment of the principal of said city's indebtedness, and a majority of all the aldermen, authorized by law to be elected, shall be necessary to assess, levy and collect said tax, to pay said city's indebtedness ; this section to continue, and be in force until the whole amount of said city's indebtedness, with the interest to accrue therefrom, is fully paid and no longer."

The General Assembly, by an act in force January 30th, 1857, entitled "An act to reduce the law incorporating the City of Galena, and the several amendatory acts, thereto, into one act, and to amend the same, and for other purposes," (session laws of 1857, page 119,) provided, on page 127, as follows :

"TAXATION.

"§1. The city council shall have power, within the city, by ordinance, to levy and collect annually, taxes not exceeding one per cent. on the dollar, on the assessed value, of all real and personal estate, and property within the city, and all personal property of the inhabitants thereof, made taxable by the laws of the State, for State purposes, to defray the general and contingent expenses of the city, not herein otherwise provided for; which shall constitute the general fund."

"§2. To annually levy and collect a School tax not exceeding five mills on the dollar, on all property taxable for State purposes, for purchasing ground for school purposes, and supporting and maintaining schools."

"§3. To levy and collect taxes, not exceeding one per cent. on the dollar, per annum, on all property subject to taxation, to meet the interest on the debt of the city; and the council shall pass no ordinance or resolution incurring or creating a debt without, at the same time, making provisions for the levying of a tax sufficient to meet the payment of the interest accruing thereon, when payable."

"§4. To levy and collect taxes on all property subject to taxation, when required, for the erection of a City Hall, Markets, Houses of Correction, Ways, Locks or Dams, the purchase of Market Grounds, Public Squares or Parks or any other public improvements."

"§5. To levy and collect on particular districts, a lamp tax."

The repealing clause of this act, does not repeal the 4th section of the act of 1852. It is thus: (page 155.)

"§20. Nothing in this act shall be so construed as to deprive the city council of said city of any power or authority conferred upon the same, by the act incorporating said city, or the various acts amendatory thereto; but, the city council shall possess and enjoy all the powers and authority heretofore conferred, except, so far as such powers have been expressly modified or repealed by this act or the acts heretofore mentioned."

The act referred to in the return of the defendant, is dated February 6th, 1865, session laws, volume 1, page 375;— and is entitled, "An act to amend an act, to reduce the law incorporating the City of Galena, and the several acts thereto; into one act and amend the same, and for other pur-

poses." It has the following provisions on this subject, (page 367.)

§12. The city council shall levy and collect a tax of one per cent. on the dollar, per annum, on all property subject to taxation, which tax, when collected, shall be set apart for the sole and exclusive purpose of paying the interest on the public debt of the city, while the same is in existence."

"§13. There shall be no farther issue of the bonds of the said city, except, in payment, exchange or renewal, liquidation of bonds already issued and due, or which may hereafter become due," &c.

"§15. The second clause of the fourth section of that portion of the act, to which this is an amendment, entitled, "City Council, its general powers and duties," is hereby repealed; and, in lieu thereof, it is hereby enacted, as follows:"

"Second, to levy and collect taxes upon all persons and property made taxable by law, for State purposes, whenever the interest of the city may require it, provided, however, that the aggregate tax, shall not exceed two and one-half per cent. per annum."

The clause which is repealed is as follows: (see acts of 1857, page 139.)

"§4. The city council shall have the management, and control of the finances and all property, real, personal and mixed, belonging to the corporation, and shall likewise have full and exclusive power and authority, within the jurisdiction of the city, by ordinance. But it shall not be lawful for said city council, in making improvements, to issue city scrip or orders on the Treasurer, to circulate as money; but the same, when not paid as money, shall be paid in bonds bearing interest."

The act of February 6th, 1865, also repeals, viz:

"§18. The following sections or clauses of the act to

which this is an amendment, are hereby repealed." Section six, of that portion of said act, entitled, "Officers, their election and appointment;" sections six, nine and eleven, of that portion of said act, entitled, "Power and duty of officers;" section three, of that portion of said act, entitled, "Taxation;" section seven, of that portion of said act, entitled, "Collection of taxes and Assessments;" the third clause of the fourth section of that portion of said act, entitled, "city council, the general powers and duties."

"§19. All acts, or parts thereof, which conflict with the provisions of this act, are also repealed; but, nothing in this act shall be so construed, as to deprive the city council of said city, of any power or authority conferred upon the same by the act incorporating the city, and the various acts amendatory thereof, except, so far as such power and authority have been expressly modified or repealed by this act, or the acts hereto mentioned."

"§20. This act shall be deemed a public act."

The demurrer was sustained, and this writ is brought to reverse it.

Before we make any argument, we print the opinion of the court, which sustained this demurrer, written by Judge Drummond and printed by his order.

CIRCUIT COURT OF THE UNITED STATES.

THE UNINED STATES *ex rel.* E. W. CLARK & BROTHERS *vs.* THE CITY OF GALENA.

THE UNITED STATES *ex rel.* HENRY AMY *vs.* THE CITY OF GALENA.

These two cases will be considered together, as there are principles and facts in them common to both. On the 6th of June, 1864, E. W. Clark & Brothers recovered judgment against the city of Galena, in this Court, for the principal and interest of bonds issued by the city for the sum of $7,139.19 and costs. On the 16th of January, 1866,

Henry Amy also recovered judgment in this Court against the city of Galena for the principal and interest of bonds issued by the city for the sum of $20,146.32 and cost. There was also a similar judgment recovered on the same day in the same Court against the city for $1,729.09 by another party, which has been assigned to Henry Amy.

Applications have heretofore been made to the Court for alternative writs of mandamas to issue against the Mayor and Aldermen of the city of Galena, requiring them to assess, levy and collect a tax to pay these judgments, on the ground that there was no property liable to execution. These writs were duly issued in both cases and have been returned, with the answer of the city of Galena in each case. To these answers demurrers have been put in, and the question is as to the sufficiency of the answers respectively. In the case of E. W. Clark & Brothers, a demurrer to the answer was sustained by the Court at a previous term, and the answer was amended. But the amended answer does not materially change the aspect of the case as then presented. The main objection to the answer is this: It sets forth that, under the law of 1857, the corporation had the power to levy and collect each year a tax of one per cent. on the assessed value of the property in the city, for the payment of the interest of the city debt; but it is not shown what has been the amount of this tax, nor that it has been regularly levied, collected, and *paid* on the interest of the debt. It is true the answer alleges that taxes were levied and collected, but that it was necessary to expend considerable sums in administering the affairs of the city, and that it owed large sums for debts—principal and interest, and all the taxes that it was possible to collect had been collected, and among the rest, the one per cent. for interest on the debt, and had been applied and exhausted by *a due and proper appropriation* thereof. Now this will not do. The answer should state the necessary facts from which the Court can see that the

Mayor and Aldermen have done their duty and properly administered the fund committed to their charge. It is quite possible that the tax which should be set apart for the payment of the city interest may have been diverted regularly and systematically from its legitimate purpose. Such an inference should be excluded by the allegations of the answer, and that not being done, without going into questions involved only in the other case, the demurrer to to the answer in the case of E. W. Clark & Brothers will be sustained.

In the case of Henry Amy, the answer, besides referring to the act of 1857, relies upon the act of 1865. It becomes necessary to consider, therefore, this last act in connection with preceding acts affecting the charter. By the act of June 21, 1852, it was declared "That the city council of Galena may, if the said city believe that the public good and the best interests of the city repuire it, annually assess, levy and collect a tax not exceeding one per cent. on the dollar, of the assessed value of all real and personal estate taxable in said city, in addition to all taxes levied and collected in said city, to be applied as follows:

"The fund so collected shall be kept separate, and shall annually, on the first day of January, be appropriated and paid over, *pro rata*, upon the funded indebtedness of the city of Galena, as may be presented by the holders of the same, to be entered as credited upon, and to that extent, in extinguishment of the principal of said city indebtedness; and a majority of all the Aldermen, authorized by law to be elected, shall be necessary to assess, levy and collect said tax, to pay said city indebtedness; this section to continue, and be in force until the whole amount of said city's indebtedness, with the interest to accrue therefrom, is fully paid, and no longer."

The act of 1857 made various changes in the powers of the council as to taxation, giving authority, as already stated, to

levy and collect one per cent. on the property to meet the interest on the city debt. The act of 1865 also made provision for the imposition of taxes by the city council, and was in some respects different from the act of 1857; but as to the tax for the payment of the interest of the debt there was no material change. The act of 1865 contained the following provision:

"The city council shall have power to levy and collect taxes upon all persons and property made taxable by law, for state purposes, whenever the interest of the city may require it; provided, however, that the aggregate tax shall not exceed two and one-half per cent. per annum."

Both the act of 1857 and of 1865 repealed all previous laws in conflict with them, but each contained a reservation as to these laws, which, though slightly differing in words, was in all substantial particulars the same. One of them was as follows:

"Nothing in this act shall be so construed as to deprive the city council of said city of any power or authority conferred upon the same, by the act incorporating said city, or the various acts amendatory thereof; but the city council shall possess and enjoy all the powers and authority heretofore conferred, except, so far as such powers have been expressly modified or repealed by this act or the acts heretofore mentioned."

The answer after stating these acts of the Legislature of 1857 and 1865, declares that the city council derives all its powers of taxation from them alone, and that they must be limited to the levying of a tax in the aggregate, not exceeding twu and a half per cent. on the assessed value of the property. It further states that the annual interest on the city debt is more than one per cent. on the assessed value of the property—that the ordinary expense of the city government exceed one per cent. on the property—that, since 1857,

there has been levied and collected, every year, all the taxes authorized, and a proper appropriation has been made of them, and that it is the intention of the city council, in good faith to levy and collect all the taxes anthorized by law, but that, in the first place, to the exclusion of creditors of the funded debt, the ordinary and contingent expenses of the city must be paid.

It will be seen that the same objection exists in substance to the language of this answer, as in the case of E. W. Clark and Brothers. It does not set forth the facts and circumstances connected with the levy and collection of the tax to meet the interest of the debt, and of the manner of its appropriation, so that the Court can see the city council has acted in good faith, and in accordance with sound principles of justice and equity. It cannot be permitted, when a judgment creditor comes into Court to have his judgment enforced against a municipal corporation without property subject to execution, and whose only remedy, therefore, is through the power of taxation on the property within its jurisdiction, that the officers of the municipality shall answer such application, that they have appropriated the money to such purposes as they thought proper, and generally as the law requires.

These debts were incurred on the faith of law, State and municipal, and of a proper administration of the property owned by the inhabitants, which are their only security, and when a creditor goes to the corporation and in vain demands payment of his debt, he has a right to insist that the officers of the corporation shall show that they have fully and faithfully administered the fund committed to their hands, and certainly that is the right of the creditor when he comes into Court for that purpose. None of the principal or interest of the bonds of the city for which these judgments were recovered has been paid. If others have been paid, why have they been preferred? It is to be recollected that the Mayor

and Aldermen of the city are just as much, to the extent of the interest involved, the Trustees of the creditors as they are of their immediate constituents, and they owe fidelity as much to one as to the other. Our towns, cities and counties have, in years past, incurred debts, for various public purposes. The evidences of debt generally fall into the hands of third parties for value. In many instances the debts become somewhat burdensome, and then a struggle follows which often ends in resistance and virtual repudiation. We all know there is not that sense of obligation in our municipal bodies to pay their debts there ought to be, and I think the courts should discourage this feeling, and hold municipal corporations, as they do individuals, to a rigid accountability to their obligations. Of course, the courts should not require impossibilities—compel payment to the destruction of the individual rights of the citizens of the municipality, but the squandering of municipal funds at the expense of creditors ought to be stopped by the courts. There may have been nothing of the kind in this case, but there may have been, and the creditors and the Court have a right to know whether there has been or not. The opinion of the Mayor and Aldermen, that the fund was *properly* appropriated, is not conclusive.

The city insists that the act of June 21, 1852, as heretofore cited, has been repealed by the acts of 1857 and 1865, and even if it has not been, that the power given in the act of 1852 was a matter of discretion merely, and, consequently, as a *mandamus* cannot issue to an individual to do what he has the discretion to grant or deny, it must be refused. There is no doubt of the soundness of the rule; the only question that can arise is whether or not in this case, if the law of 1852 is still in ferce, it is a matter of *mere* discretirn with the city council.

It is contended by the relator that, as the parties purchased

the bonds, and they were issued on the faith of the law of 1852 and other laws, that these laws enter into and become a part of the contract, and that even the Legislature cannot repeal them under such circumstances. This is a very important question and one now pending before the Supreme Court of the United States, in several cases that have gone there from Illinois and Iowa. It is not necessary to decide it in this case in its present aspect, but it is quite certain that no Court would interpret a subsequent law as repealing such a prior one unless the language was entirely unambiguous and capable of no other construction. Is the act of 1852 repealed by the act of 1857 or of 1865? I think not. All *may* stand together. The limitation in the act of 1865, as to the extent of taxation, may reasonably be construed as referring to the kind and purpose of taxation set forth in that act, and as declaring that the amount of *such* taxes should not exceed two and a half per cent. The language of the proviso as to previous acts is peculiar: "Nothing in this act shall be so construed as to deprive the city council of any power or authority conferred (by prior acts) except so far as such power or authority have been *expressly* modified or repealed by this act." It cannot be claimed that the power contained in the act of 1852 is *expressly* modified or taken away. It is only by implication that the power is gone, if at all, and I confess I do not feel inclined to apply the doctrine of repeal by implication to the provisions of the act of 1857 or 1865 touching the subject matter of investigation; the more especially when the last clause of the section of the act of 1852 declares in terms that is *to continue and be in force until the whole amount of the city indebtedness, with the interest, is fully paid.*

The question is then presented whether the city of Galena —assuming that the law of 1852 is still in force and unrepealed—can, in its discretion, refuse to exercise the author-

ity therein conferred, under the circumstances as they appear upon the record? The inquiry naturally suggests itself, if this is so what *can* be done? Here is a large indebtedness due from the city. The taxes which they levy and collect do not even pay the interest on the debt, to say nothing of the principal. For many years no portion of the interest on the bonds passed into judgment in this case, has been paid. Is this always to remain so? Is an authority which *can* be employed never to be brought into exercise, because the city council choose to let it lie dormant? In the absence of evidence showing an absolute inability for want of power, is there to be this claim without any remedy whatever? and that too in the absence of proof clearly indicating that the city has not the means to pay the whole or any part of the debt? Taking its own statement, contained in the answer, there is property in the city of value exceeding more than five times the amount of the debt, which is, or ought to be, liable to pay it. It seems to me that the only answer that can be given by the municipal authorities under such circumstances to a demand for payment in whole or, at least, in part, is that their functions are completely paralyzed by some inflexible mandate of the law and not merely that they do not deem it expedient under the circumstances to exercise a power clearly given. The language of the act of 1852 is that the council may annually assess, levy and collect a tax not exceeding one per cent., to be appropriated to the payment of the city indebtedness, *pro rata*, "*if the said city believe that the public good and the best interests of the city require it.*" If ever this faculty is to be called into action, why not now? Is it not clear that the public good, in its largest and truest sense, and the best interests of the city do require it? Is a city, with confessedly so many resources at its command to sink into hopeless bankruptcy without an effort? What was that law passed for if not

for just such a case as now exists? There is a rule applicable here, I think, which has heretofore been established by this Court. It is this, that when evidences of indebtedness are issued by a municipal corporation under laws which declare that the authorities may in their discretion impose taxes for the payment of the principal and interest, and the bonds or notes for such indebtedness are received by the commercial world on the faith of those laws and of that authority, it is a discretion which *must* be exercised, if that is the only resource of the corporation to meet the payment. That is a rule both the Judges of this Court enforced in the case of The United States ex. Rel. State Bank vs. Supervisors of Rock Island county, after elaborate argument, and full consideration, and although the case is now pending in the supreme Court, I cannot doubt the correctness of the doctrine there maintained. It becomes then, in the contingency stated, bad faith not to exercise the authority given, and it ceases, consequently, to be a case of absolute discretion at the mere will of the corporation officers. The language of nearly all laws on the subject of taxation by a municipality, is only permissive, They *may* impose taxes for such or such purposes—not that they must or shall do so; and yet courts would undoubtly, and do, construe them in all fitting cases as compulsory.

I think therefore, that the reasons given by the city of Galena in this case of Henry Amy, as well as in the case of E. W. Clark & Brother, why it has done nothing, and proposes to do nothing, towards the payment of the principal and interest of the bonds on which these judgments have been recovered, are insufficient and not good in law.—The demurrer to the answer must consequently be sustained.

The relator claims that inasmuch as the demands against the city have been reduced to judgments, it is encumbent on the corporation to pay first these judgment debts in prefer-

ence to all others; otherwise it is insisted there is no reward for vigilance and effort.

I do not think it necessary to determine the soundness of this principle at this time. It is apparent that many considerations would be involved in the investigation of that point, which do not exist here. I content myself with deciding the questions that fairly arise on the record.

ARGUMENT.

To an opinion, which so fully disposes of the questions argued by the plaintiff, we have but little to add except confirmatory authorities.

The application for this writ is based upon the plaintiffs' right to have his judgments paid by the levy of a tax of one per cent. to pay the interest, and one per cent. to pay the principal, per annum, and to have this tax levied, continuously, until the whole debt is paid.

1st. As to the one per cent to pay the interest, the answer says that it has levied certain taxes in 1865, among others this one per cent., and applied it to pay interest; and that it expended considerable sums of money about city affairs; that all the taxes possible had been collected, and exhausted "by a due and proper appropriation." "Now," said the Court, "this will not do;" the answer should state facts, and permit the Court to see that the money was "duly and properly appropriated." That was, (in the facts which ought to have been stated,) a question of law and not of fact. But how does this answer the command of the writ to continue to levy and apply it to the plaintiff's judgments. Surely the plaintiff below being a diligent bond creditor, having a judgment, is entitled to the aid of the Court to reward him for his diligence. The plaintiff's execution was not paid by any of this tax of 1865. If the defendants below can shelter themselves by the general allegation that they have duly ap-

propriated the tax, the judgment creditor will never get his money.

The Act of February 6, 1865, required the city council (sec. 12) to levy a tax of one per cent., which should be set apart for the sole and exclusive purpose of paying the interest on the public debt of the city while the same is in existence. Does the returns show that this was done in any manner? The city debt is $142,000; the tax $740,-000; the interest is $8,500; the tax $7,400. If all the other creditors had been paid in full, and the plaintiff, by reason of his being a judgment creditor with execution out, only paid the residue, he would have got something. The return admits that he is paid nothing. If he, by his judgment, gained a preference, he would have been paid his whole interest, and part of his principal from this levy.

The mandate of this writ is, that the defendants shall, in future, levy a tax of one per cent. to pay interest and apply it specifically to the plaintiff's interest. Is there any fact shown in the return why this mandate should not be obeyed? The defendant says, that such a tax was levied in 1865 and applied in payment of interest. This, says the court, will not do. The plaintiff's judgments cover interest to the amount of $4,214.49 in Amy's case, and $220.09 in Clark's case, making interest in the round sum of $4,434.58, which, on the principal bonds, $17,500 was unpaid interest for over four years. The fact of this unpaid interest could not be controverted. Does the return show how much interest tax was collected in the previous four years, and to what bonds it was applied? Does the return show how much tax was levied and how much collected each previous year? Does it show any cause why the interest tax for '66 and subsequent years should not be applied to plaintiff's judgments? The plaintiff, as a judgment creditor, is entitled to have all the tax applied to his judgments. Admit that he is only entitled to

a share; does the return show that the plaintiff is to get anything? Well, may we repeat the words ef the court, this sort of return will not do.

The next demand of the writ is that the city council shall under the act of 1852 which it is admitted that is in force, levy a tax of one per cent. to pay the plaintiff's judgment. By that act and continuous acts, the city council was authorized to levy a tax of one per cent. for general purposes, to "defray ordinary contingent and *other expenses* of the city not otherwise provided for, and sec. 4 to levy a tax of one per cent. to pay the the principal of the public debt, the fund to be collected and kept separate; to be apportioned annually on the 1st of January to such creditors as might present their claims, if the city council believed the public good and the best interest of the city required it.

This section was to continue in force until the whole amount of the city debt, with interest, was paid. The argument of this point by the plaintiff rests upon the ground that the levy of this tax was a matter optional with the city council; and if they refuse to form a belief for the public good and interest of the city, they can forever refuse to levy it, use their other taxes for other purposes, and never pay the public debt. We can add bue little to the force of the argument of the Court below. We think, however, that when the city council authorized the issue of these bonds, and pledged the public faith for their payment, it made its election that the public good did require the exercise of this power. The section in question referred to two periods of the public debt.—First, it gives the power to levy this tax to create a sinking fund, which the creditor might accept on the first of January each year, before his bond was due; but the latter part of the section continues the power and requires its exercise until the whole city debt and interest is paid. It is all idle to talk about the city council acting in good faith and not be-

ing compelled to exercise this power as long as they may capriciously or seriously believe the public good does not require the exercise of this power. It is idle to talk about there being no question of good or bad faith before the Court. Here is a judgment, a return of nulla bona.—No property to be found; no money applied to the payment of the debt, and yet the city able and authorized to wipe out the whole judgment by a single levy under powers granted for that purpose.

This power must be exercised to levy this one per cent., when there is no other tax or fund out of which it can be made. The law has some meaning. It is not a snare to entice credit; a trick to be used to borrow money, all very good, when you are making promises to pay, but dead ashes when the day of payment arrives.

This precise power is fully reviewed and discussed in the case referred to in the court below, in a case now pending in this court: No. 280, Board of Supervisors of Rock Island county, vs. U. S. ex. rel. State Bank; many cases are there cited, which we shall not repeat at large. The leading case relied on, is Mason vs. Fearson, 9 Howard, 248. It is there held, that where a law provides that a corporation "may" act, or "it shall be lawful" for them to act, in a certain way, it may be insisted on as a duty to be performed, "for them so to act," when it relates to the public or third persons. One of the cases, cited by the court in 9 Howard, is precisely like the case now before the court.

"Indictment against church wardens for not making a rate" (levying a tax) "to reimburse constables. Exception was taken, that the statute only puts it in their power to do so by the word may, &c., but does not require the doing of it as a duty; but this is not agreed to—for where a statute directs the doing of a thing for the sake of justice or the public good, the word may is the same as shall, thus the Sheriff may take bail, is construed, he shall."

In addition to the many cases brought before the court, in the case in 9 Howard and others, cited in the argument of 280, we refer to the case of Coy vs. the City Council of Lyons, 17 Iowa, 1.

In that case, the city council was authorized, in its discretion, (see page 4 of the opinion to levy a tax of not over ten mills,) and they answered, that they had levied five mills, and that to apply such tax to the payment of the plaintiff's claim, would deprive the city of the means of discharging its ordinary functions.

"The court held that the rule, that discretion could not be controlled by mandamus, is limited to tribunals having a purely discretionary power in the matter, and cannot be extended to boards or persons upon whom the law has devolved a public duty, which can only be performed by the exercise of a discretion in some manner. Every person and corporation has a purely discretionary power over his and its own property; but no person or corporation is permitted, under the law, to avoid the payment of his or its just debts, which is a duty devolved upon them by law, and which no plea of discretionary power can defeat. The city council of Lyons may have a discretion beyond the control of courts, in fixing the rate of levy for ordinary city purposes; but where a creditor has obtained judgments, which can only be paid by the levy of a particular tax rate for a given year, a duty is thereby devolved upon the city council to levy such a rate of tax, not exceeding the maximum limit, as will pay off the judgments. That duty results from the plain moral, as well as legal obligation resting on the city to pay its debts; and no discretion within the limits of performance of that duty, can be rightfully claimed by the city council. The discretion which they may exercise in such cases, is not an independent personal discretion, but a *legal* discretion, which they must exercise

in accordance with their plain legal duty, or upon their failure so to do, the Courts will, under the common law as well as statute, compel such performance." This cause holds, and justly, that the whole revenue of a corporation, less expenses of collection, which they can levy for general purposes, must be applied to the payment of a judgment.—That a judgment creditor of such corporation, by his diligence gets a lien on the whole general public tax, which the corporation cannot evade by the creation and payment of new debts within their discretion.

Bring this question to a practical solution. A corporation creates debts upon the faith and credit of its revenue.—If it were an individual, the way to reach this income is plain enough. Now is the obligation less or the remedy less because the debt is created and the revenue received by a corporate body? Mandamus is the proper remedy to reach this revenue, and the judgment creditor against a corporation can no more be answered by such corporation than he can be answered by an individual; you have got judgment execution and return no property; I have a revenue, but I choose to make new debts and pay them because the public good, in my opinion, requires it, and you can't have the money.

The objection to the form of the writ is waived by the plaintiff in error.

J. GRANT,
For Def't in Error.